TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 148.

THE CITY OF LOS ANGELES, HERMAN SILVER, Z. D. MATTHUSS, ET AL., APPELLANTS,

vs.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS LAND AND WATER COMPANY, AND S. O. MURPHY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 10, 1899.

(17,014.)

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a In the Supreme Court of the United States.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS LAND and Water Company, and S. G. Murphy, Complainants and Respondents,

vs.

THE CITY OF LOS ANGELES, HERMAN SILVER, Z. D. MATTHUSS, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchinson, F. M. Nickell, and F. L. Baker, Composing the Council of the City of Los Angeles, Defendants and Appellants.

UNITED STATES OF AMERICA, *ss:*

To Los Angeles City Water Company, Crystal Springs Land and Water Company, and S. G. Murphy, Greeting:

Whereas the City of Los Angeles, Herman Silver, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchinson, F. M. Nickell, and F. L. Baker, composing the council of the city of Los Angeles, have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of California, made in favor of you, the said Los Angeles City Water Company, Crystal Springs Land and Water Company, and S. G. Murphy, and have filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the 10th day of October next, to do and receive
b what may appertain to justice to be done in the premises.

Given under my hand, at the city of Los Angeles, in the ninth circuit, this 7th day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

OLIN WELLBORN, *Judge.*

Service of foregoing citation on appeal is hereby accepted on behalf of complainants and respondents this 7th day of September, 1898.

WHITE & MONROE,
J. S. CHAPMAN,
Solicitors for Respondents.

c [Endorsed:] No. 734. R. Org. Supreme Court of the U. S. Los Angeles City W. Co. *et al.*, respondents, *vs.* City of Los Angeles *et al.*, appellants. Citation. Filed Sep. 7, 1898. Wm. M. Van Dyke, clerk; —— ——, deputy. W. E. Dunn, A. Crutcher; Lee & Scott, rooms 411–414 Bullard block, Los Angeles, California, solicitors for appellants.

1 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS Land & Water Company, and S. G. Murphy, Complainants,
vs.
THE CITY OF LOS ANGELES, HERMAN SILVER, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, Composing the Council of the City of Los Angeles, Defendants. } No. 734.

2 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS LAND & Water Company, and S. G. Murphy, Complainants,
vs.
THE CITY OF LOS ANGELES, HERMANN SILVER, Z. D. MATTHUS, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, Composing the Council of the City of Los Angeles, Defendants.

The Los Angeles City Water Company, a corporation organized under and in pursuance of the laws of the State of California and having its principal place of business in the city of Los Angeles, county of Los Angeles, in said State, and the Crystal Springs Land and Water Company, a corporation organized under and in pursuance of the laws of the said States of California and having its principal place of business in the city of Los Angeles, and S. G. Murphy, a resident and citizen of San Francisco, in the State of California, bring this their bill of complaint against the said City of Los Angeles, a municipal corporation organized under the laws of the State of California, and Hermann Silver, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, composing the council of the city of Los Angeles; and thereupon your orators complain and say:

I.

3 That the Los Angeles City Water Company is and for more than twenty years has been a corporation duly organized under the laws of the State of California and having its principal place of business in the city of Los Angeles.

II.

That the Crystal Springs Land and Water Company is and for ten years last past has been a corporation duly organized under the laws of the State of California and having its principal place of business in said city of Los Angeles.

III.

That the City of Los Angeles is and during all the times herein mentioned has been a municipal corporation duly organized under the laws of the State of California, and the said other defendants compose the council of the city of Los Angeles, and the said council of the city of Los Angeles is the governing body thereof.

IV.

That on or about the 22nd day of July, 1868, the said City of Los Angeles entered into a contract with J. S. Griffin, P. Beaudry, and Solomon Lazard with respect to furnishing water to the inhabitants of the city of Los Angeles by the said parties, and which said contract bears date the 20th day of July, 1868, and is in the words and figures following, to wit:

"This agreement made and entered into this the 20th day of July, A. D. 1868, between the corporation known as the mayor and common council of the city of Los Angeles, and their successors in office, for and on behalf of said city of Los Angeles, party of the first part, and John S. Griffin, Prudent Beaudry and Solomon Lazard, residents of the city and county of Los Angeles, State of California, party of the second part witnesseth; that for and in consideration of the yearly payment of one thousand five hundred dollars per annum in gold coin, such payments to be made upon the first day of January of each year, after the signing and approval of this ordinance
4 and contract, until the conclusion of the term of this contract; and the further consideration that the said parties of the second part will surrender to the said party of the first part and cancel all claims they now hold against the said city for repairs of said water works, and for damages amounting to the sum of eight thousand dollars, a little more or less; and for the further consideration *of* the said parties of the second part, shall make the following improvements about, in and upon the said water works at their own proper cost and expenses, to wit: Lay down in streets of said city, twelve miles of iron pipes of sufficient capacity to supply the inhabitants of said city with water for domestic purposes, and shall erect, or cause to be erected one hydrant to be used as a protection against fire, at one corner of each cross-street of said city, where the water pipes now are, or may hereafter be laid by virtue of this contract, and shall, within one year from the approval of this contract and ordinance, erect or cause to be erected, an ornamental fountain upon the public plaza of said city, of such design as the mayor and common council shall direct, at a cost not to exceed one thousand dollars; and shall within two years from the approval of this contract and ordinance construct, at their own expense, such ditches, flumes, or erect such machinery in connection with said water works, as will secure to the inhabitants of said city, a constant supply of water for domestic purposes, and shall construct reservoirs of sufficient capacity for that purpose. The said party of the first part, for the above considerations, and one dollars in hand paid, the receipt whereof is hereby acknowledged, hereby covenants and agrees

with the said party of the second part, their heirs, executors, administrators, or assigns, to deliver and concede to the said parties of the second part, their heirs, executors, administrators or assigns, the exclusive use, control, possession and management of the Los
5 Angeles city water works, so called; together with all and singular, the pipes, flumes, wheels and other personal property composing and appertaining to said water works, in any manner whatsoever, with all the rights, easements and privileges, and covenants as described and contained in a certain instrument of lease, executed by the mayor and common council of the said city of Los Angeles, of date October sixteen, A. D., one thousand eight hundred and sixty-five to Jean L. Sansevaine, for the period of thirty years from the signing and approval of this contract and ordinance, with the right to sell and distribute water for domestic purposes, and to receive the rents and profits thereof for their own use and benefit, except as hereinbefore provided, hereby giving and granting the said parties of the second part, their heirs, executors, administrators, or assigns, the right to lay pipes in any and all the streets of said city and to dig and make all necessary excavations for that purpose, and the right of way through, upon, and over lands or streets belonging to the said city of Los Angeles, with the additional right to take water from the Los Angeles river at a point above or near the present dam; provided, always, that the said parties of the second part, their heirs, executors, administrators, or assigns, shall at no time take from said river for the use of said water works, more than ten inches of water, without the previous consent of the mayor and common council of said city; and that they will, within sixty days from the date hereof, select the point from which the water will be taken from said river. The said party of the first part hereby covenant- and agree- with the said parties of the second part, their heirs, executors, administrators or assigns, that, at the expiration of the period of thirty years from the execution of this instrument, *they* will pay to the said parties of the second part, their heirs, executors, administrators or assigns, the value of the improvements made in, about and upon the said water works, in
6 pursuance of this contract, the same to be ascertained by arbitration, in case the parties cannot agree upon the value thereof, the said party of the first part and the parties of the second part, their heirs, executors, administrators or assigns, to choose one man each, and the two men thus chosen to select a third man, and the judgment of the three men thus selected shall be final in the premises. And the said party of the first part hereby covenant- and agree- to make no other lease, sale, contract, grant or franchise to any person or persons, corporation or company for the sale or delivery of water to the inhabitants of said city for domestic purposes during the continuance of this contract, always without prejudice to any rights already granted. And the said parties of the second part, their heirs, executors, administrators or assigns, hereby covenant and agree with the said party of the first part, that they will pay the sums of money at the time and in the manner hereinbefore mentioned and set forth, and cancel the claims hereinbefore

mentioned, upon the signing and approval of this contract and ordinance by the proper parties thereto; that they will make the improvements hereinbefore mentioned and set forth, in the following manner, to wit: That they will replace all the wooden pipes now belonging to said water works within one year from the signing and approving of this contract and ordinance, and that they will extend said iron pipes as fast as the citizens, desiring to be supplied with water for domestic purposes, will agree to take sufficient water to pay ten per cent. per annum interest upon the cost of extending such pipes through the streets now unsupplied with water. That they will, within one year from the date, place a hydrant to be used as a protection against fire at one corner of one street at each of the cross-streets where the pipes are now laid down, and will erect hydrants at other street corners, according to the terms of this contract, as fast as the pipes are extended through
7 the streets of the said city. That they will erect, or cause to be erected, an ornamental fountain upon the public plaza, of such designs as the mayor and common council shall direct, within one year from the date hereof; that they will furnish water for the public schools, city hospitals and jails, free of charge, when the same are near the pipe, the city furnishing the necessary conduits for that purpose; that they will make all the improvements herein mentioned and set forth, and keep the same in repair at their own cost and expense, for the said period of thirty years, and return the said water works to the said party of the first part at the expiration of the said period of thirty years, in good order and condition, reasonable wear and the damage of the elements excepted, upon the payment to them of the value of the improvements made after the approval of this contract, to be ascertained as hereinbefore provided, and give a bond in the sum of twenty thousand dollars, conditioned for the compliance by them of the conditions of this contract, to be approved by the mayor of said city; and will pay all State and county taxes assessed upon said water works during the said period of thirty years. Always provided that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said parties of the second part or their assigns, provided that they shall not so reduce such water rates or so fix the price thereof to be less than those now charged by the parties of the second part for water; provided, that a certain contract of lease heretofore executed by the mayor and common council of said city to Jean L. Sansevaine, of said water works, of date October sixteenth, A. D., one thousand eight hundred and sixty-five, be surrendered and cancelled up at or before the signing of this contract; provided, always, that the rights and privileges by these presents conceded to said parties of the second part, do not
8 embrace, to any extent, of have any reference to the water works of said city used for the distribution of water for the purposes of irrigation, or affect in any manner any rights of irrigation, either existing at present, or which may exist hereafter, except as to the ten inches of water, as hereinbefore provided. And it is expressly stipulated and covenanted that said parties of the second

part shall not dispose of any water for the purposes of irrigation, but shall only take from said river the water necessary for domestic purposes, as above specified.

"In testimony thereof the said parties have hereunto set their hands and seals the day and year first above written.

"JOHN KING, *President.*

"Approved this 22d day of July, A. D. 1868.

"C. AGUILAR, *Mayor.*
"JOHN S. GRIFFIN. [SEAL.]
"P. BEAUDRY. [SEAL.]
"S. LAZARD. [SEAL.]"

V.

Your orators further allege that the said contract of lease executed by the mayor and common council of said city to Jean L. Sansevaine of the water works therein referred to and of date October 16th, 1865, and mentioned and referred to in the said agreement hereinabove set forth, was surrendered up and cancelled at or before the signing of the said contract herein set out.

VI.

Your orators further state and show that the said contract so executed by the said city of Los Angeles with the said John S. Griffin, P. Beaudry, and S. Lazard was, for a valuable consideration, afterwards and before the 19th day of April, 1870, assigned by the said P. Beaudry, Solomon Lazard, and John S. Griffin to the plaintiff, The Los Angeles City Water Company.

9 VII.

The said Beaudry, Lazard, and Griffin and the said plaintiff, The Los Angeles City Water Company, did and have performed all of the terms and conditions of the said contract on their part to be performed.

VIII.

Your orators further state and show that at the time of the execution of the said contract, and at the time of the assignment thereof by the said Griffin, Beaudry, and Lazard to the Los Angeles City Water Company, the city of Los Angeles was a small town, having not more than five or six thousand inhabitants and not more than two or three miles of graded streets, but that since the execution of the said agreement the city of Los Angeles has increased in population until there are now about seventy-five thousand inhabitants, exclusive of the territory that has recently been incorporated into the said city; that buildings of all kinds, business blocks, manufacturing establishments, and residences have been constructed in all parts of the city, and the number of houses of all kinds now being in the said city is probably at least fifteen thousand, and there have been since the date of the said contract con-

structed for the convenience and use of the inhabitants about forty school-houses for use as public schools, and all other kinds of building-, hotels, city hall, jails, county court-house, and jails, theaters, pavilions, and all other sorts of edifices have been constructed and increased in number in accordance with the general growth of the city. Street railways, steam railways have increased in number and the extent of their mileage until there are now probably seventy-five to one hundred miles of street railways laid in the said city and are now being operated, and about seventy-five to one hundred miles of graded streets in said city. Parks have been laid out and improved, and the increased demand for water in the said city has been in greater proportion since the said contract was made and assigned to the said Los Angeles City Water Company than the increase in population.

IX.

Your orators further state and show that in order to perform the contract on the part of the said Los Angeles City Water Company, and especially to extend the iron pipes provided for in the said contract as fast as the people of Los Angeles city desired to be supplied with water for domestic purposes and would agree to take sufficient water to pay ten per cent. per annum interest upon the cost of extending such pipes through the streets which were at that time unsupplied with water, and to obtain a supply of water over and above the said ten inches mentioned in said contract and leased to the said Beaudry, Griffin, and Lazard, an assignment of which said lease was made to the Los Angeles City Water Company, the said Los Angeles City Water Company has been compelled to expend a large amount of money, to wit, more than two millions of dollars, in laying down pipes in the streets of said city to furnish the inhabitants thereof with water, and to furnish water for the public schools, city hospitals, and jails, as in the said contract provided, and have laid down, over and above the twelve miles of iron pipe which they had agreed to lay in the said contract, about three hundred miles of iron pipe, to be used and now used for the purpose of furnishing the said city and its inhabitants with water, in compliance with the terms and conditions of the said contract.

X.

Your orators further state and show that the said ten inches of water so leased by the city of Los Angeles to their assignors of the Los Angeles river long ago became wholly insufficient to supply the inhabitants of said city with water, and, besides, the points from which it was to be taken were at such elevation that it was impossible to take the said water to those portions of the city which in the last twelve or fourteen years have grown up in the general increase and prosperity of the city; and the said Los Angeles City Water Company has, at immense outlays of money, purchased the system that was established by Prudent Beaudry, and known as the Beaudry system of water works, and also the

system established by the East Side Spring Water Company, and has also purchased and now owns and holds certain water rights in the Arroyo Seco (a stream flowing into the city of Los Angeles from the northeastern side), and has conducted the water from the said Arroyo Seco into the said city and on the eastern side of the Los Angeles river for the supply of the inhabitants of that portion of the city, and said systems of works and said water rights are now being used and operated by said Los Angeles City Water Company for the purpose of furnishing the city of Los Angeles and the inhabitants thereof with water under and in pursuance of the said contract.

XI.

Your orators further state and show that about the 22nd day of March, 1843, Manuel Micheltorena, then being the governor of both Californias, appointed under the Mexican government, granted to Maria Ygnacio Berdugo a certain tract of land bounded on the south by the north boundary of the city of Los Angeles, and which said tract was known as the Rancho Los Feliz, and which grant was, after the acquisition of California by the United States, and on or about the 26th day of October, 1852, presented by the said Maria Ygnacio Berdugo to the commissioners appointed to ascertain and settle the private land claims in the State of California under an act of the Congress of the United States entitled "An act to ascertain and settle the private land claims in the State of California, approved March 1st, 1851," for the confirmation of said tract known as the Rancho Los Feliz, and such proceedings were thereupon had that on the 28th day of February, 1854, the said claim was confirmed by the board of land commissioners, and the decree of confirmation was confirmed by the district court of the United States for the southern district of California at its De-
12 cember term in 1856, and it was by the said decree of the said court adjudged that the title of the said Maria Ygnacio Berdugo to the said lands known as the Rancho Los Feliz was good and valid, and the Attorney General of the United States having given notice that the appeal from the said decree of the said district court would not be prosecuted to the Supreme Court of the United States, it was by the said district court, at its December term in 1857, ordered that the said appeal should be, and the same was thereby, dismissed; and it was further decreed that the appellee should have leave to proceed under the decree theretofore made in her favor as under a final decree; and afterwards a survey of the said granted premises was made by and under the authority of the United States; and afterwards, to wit, on the 18th day of April, 1871, a patent was duly issued by the United States to the said Maria Ygnacio Berdugo, giving and granting unto her the said Rancho Los Feliz.

XII.

Your orators further state and show that on the 20th day of October, 1874, a grant was made by Pedro Fajes to Julio Berdugo and others of a certain tract of land of eight square leagues, situated in

Los Angeles county, bounded upon the western side thereof by the Los Angeles river, and known as the San Rafael rancho, and which grant was subsequently, to wit, on the 12th day of January, 1798, confirmed to Jose Maria Berdugo, and after the acquisition of the State of California by the United States Government a claim to the said lands under the said grant was presented to the said board of land commissioners on the 21st day of October, 1852, and said claim to said San Rafael rancho was confirmed by the said board of land commissioners on the 11th day of September, 1855, and finally confirmed by the United States district court on the 4th of June, 1857; and thereafter, to wit, on the 28th day of January,
1882, a patent was duly issued by the Government of the
13 United States, granting the said tract of land known as the San Rafael rancho to Julio Berdugo and Catalina Berdugo; which said patent was issued upon the confirmation of the said grant.

XIII.

Your orators further state and show that many years ago, to wit, in the year 1869, the necessities of the city already requiring more water than the ten inches leased under the said contract, the Los Angeles City Water Company purchased of Charles V. Howard (who had prior to that time acquired the title to the said Los Feliz rancho under the patent from the United States) a portion of the said Los Feliz rancho known as the Crystal Springs tract, in the said Rancho Los Feliz, and cut a ditch from the said Crystal Springs to divert water therefrom to increase the supply of water for the city; that subsequently the Crystal Springs Land and Water Company was duly organized, and the said Crystal Springs tract was conveyed by the said Los Angeles City Water Company to the Crystal Springs Land and Water Company, and that company acquired by purchase from the owners of the remainder of the Los Feliz rancho and from the owners of portions of the said San Rafael rancho the right to enter upon the said lands, parts of the Los Feliz and San Rafael ranchos, to develop and collect together the waters percolating in the soil upon the said ranchos and within the tracts where the said right of development and collection and diversion had been acquired, and the said Crystal Springs Land and Water Company did, at enormous expense, make excavations and lay pipes within the said portions of the said Los Feliz and San Rafael ranchos, and did develop of the percolating waters in the said soil about seven hundred inches of water, measured under a four-inch pressure, and the said waters were conducted by the said Crystal Springs Land and Water Company, under and by virtue of the rights so acquired from the owners of the said lands, to a point to connect the conduits with the system of water
works owned by the Los Angeles City Water Company, and
14 the said Crystal Springs Land and Water Company, by the grants from the owners of the said portions of the said Ranchos Los Feliz and San Rafael where said developments were made, became vested with the right to make the said excavations

and to own, take, divert, and use the waters which they might by the said work develop and by said pipes divert; and having so acquired the said waters and the right to the use and disposition thereof, the said Crystal Springs Land and Water Company did lease to the Los Angeles City Water Company the said seven hundred inches of water, with the right to take the same, and through the said system of works owned by the said Los Angeles City Water Company conduct the same into the city of Los Angeles, and with them to supply the said city and the inhabitants thereof with water, and that the said Los Angeles City Water Company did accept such lease and did agree to pay to the Crystal Springs Land and Water Company twenty-five per cent. of the gross amount received by it, the said Los Angeles City Water Company, for water rates collected within the said city of Los Angeles for the rent thereof.

XIV.

Your orators further state and show that at the time the said developments of said waters were made and the ownership of and right to conduct and use the same was acquired by the Crystal Springs Land and Water Company, and at the time the said lease thereof and of the conduits through which the said waters were conducted was made to the Los Angeles City Water Company, the city of Los Angeles had increased in population and general improvements to such an extent that the acquisition of further water supply was absolutely necessary to enable the Los Angeles City Water Company to perform its said contract and to supply the inhabitants of said city with water.

XV.

Your orators further state and show that in the acquisition of the said water rights and in the development and collection of the said percolating waters, and the construction of the said pipes to convey said percolating waters, and the purchase and laying of water pipes throughout the city of Los Angeles for the purpose of supplying the said city with water, as in the said contract provided, the said two companies, the Los Angeles City Water Company and the Crystal Springs Land and Water Company, have expended large amounts of money, to wit, about three millions of dollars.

XVI.

Your orators further state and show that the said corporations have contracted a bonded indebtedness of $409,000.00, and to secure the payment of the same did convey to the said plaintiff, S. G. Murphy, the said properties and water rights in trust to secure the payment of the said bonded indebtedness to the holders of the said bonds, and the said S. G. Murphy still holds the said property under the said deed of trust to secure the said bonded indebtedness, which said bonded indebtedness is still outstanding and unpaid, and the Los Angeles City Water Company still holds the lease from the

Crystal Springs Land and Water Company of its said water rights and water works under the provisions of the said lease by which it, the said Los Angeles City Water Company, agreed to pay twenty-five per cent. of its gross receipts from water rates in the city of Los Angeles to the said Crystal Springs Land and Water Company as the rent thereof; and your orators further state and show that the said Los Angeles City Water Company has, ever since it acquired the said contract rights of Griffin, Beaudry, and Lazard, been engaged in furnishing the city of Los Angeles and its inhabitants with water under and in pursuance of the said contract; that the said Los Angeles City Water Company has furnished and is still furnishing to the said city water for the public schools, city hospitals, and jails free of charge when the same are near the pipe, the city furnishing the necessary conduits for that purpose; that the said Los Angeles City Water Company has, ever since it acquired the said rights, been placing hydrants, to be used as protection against fire, at one corner of one street at each cross-street, where the pipes were laid down at the time the said contract was made, and have been erecting hydrants at other street corners according to the terms of the said contract as fast as the pipes were extended through the streets of the said city and whenever notified by the said council of the said city of the place at which said hydrants were desired to be placed by the said city, and have been furnishing water to the said city for the extinguishment of fires free of cost, and still are furnishing such water to the said municipality for the said municipal uses without charge, and have in every respect performed and are still performing all of the terms and conditions of the said contract on their part to be performed.

XVII.

Your orators further state and show that in the year 1870, some difficulty arising concerning the rates that were charged for the furnishing of water to the inhabitants of the city at the date the said contract was made between the said Beaudry and others, hereinbefore set forth, commissioners were appointed by the said city for the purpose of ascertaining and determining that amount, and after investigation and examination the said committee reported and the said council accepted the rates hereinafter set forth as being the rates charged at the date of the said contract; that the said rates so ascertained and determined by the said commissioners were accepted by the said city and the Los Angeles City Water Company, and it was agreed between them that the same should be accepted as the rates to be charged by the said Los Angeles City Water Company under the said contract, and of which said rates the following is a copy:

"SECTION 1.	For tenements occupied by a single family of not more than five persons.....	$2.00
	"For each additional person.....	.25
"SECTION 2.	Bathing-tubs in private houses (for each tub)	1.00
	"In public houses, boarding-houses, bath-	
17	ing establishments, barber shops (for each tub)..... ...	3.00
"SECTION 3.	Bakeries according to the monthly use of flour, for each twenty-five barrels.....	2.00
"SECTION 4.	Boarding schools, in addition to the rate for private families, for each scholar.....	.20
"SECTION 5.	Building purposes, by special contract (for each barrel of lime).....	.20
"SECTION 6.	Fountains, by special contract only, and in no case will be permitted on premises where water is not taken for other purposes, and if water be allowed to flow into other premises where it may be used for other purposes, supply will be stopped and the amount of payment forfeited.	
"SECTION 7.	Horses, private, including water for washing carriages, for one horse.....	.25
	"Omnibus, stage, stable, each horse..	.50
	"Truckmen's carts and saddle-horses.....	.50
	"Provided that in no case shall any stable be charged less than.....	2.00
"SECTION 8.	Horse troughs, for each trough on sidewalk.....	$5.00 to 10.00
"SECTION 9.	Hose on premises not having a front of more than twenty-five feet, for the right to attach a hose not exceeding three-fourths of an inch orifice, for washing sidewalks and sprinkling streets, in addition to the charges for other uses	1.00
	"Premises above twenty-five feet in proportion.	
"SECTION 10.	Hotels, taverns, and boarding-houses, not including water for baths or for uses without the house, for each bed for boarders	
18	and lodgers within the same, in addition to the rate for private families	.25
	"For each boarder.....	.20
"SECTION 11.	Lodging-houses, in addition to rate of family keeping the house, for accommodation for each person within the same..... ...	.20
"SECTION 12.	Gardens—sprinkling gardens and grounds, not more than one hundred square yards area.	1.00
	"Above this area, for every one hundred square yards shall be charged..... ..	.12

"SECTION 13.	Porter-houses, groceries, refectories, etc., shall be charged at the discretion of the water register.....	$2.00 to 10.00
"SECTION 14.	Printing offices at the discretion of the water register.	
"SECTION 15.	Railroad corporations, rate subject to special agreement in accordance with the quantity of water used.	
"SECTION 16.	Steame-ngines, according to the quantity used at the discretion of the water register.	
"SECTION 17.	Stores, offices and warehouses, and tenements not included in any other classification, and requiring only an ordinary amount of water, at the discretion of the water register, not less than.....	2.00
"SECTION 18.	Water-closet—for each water-closet, public..	2.00
	"Water-closet—for each water-closet, private.	1.00
"SECTION 19.	For large quantities of water, when the quantity used does not exceed 15,000 gallons per month, there shall be charged for each 1,000 gallons consumed, as ascertained by meter or otherwise.....	1.25
19	"When the quantity is over 15,000 gallons per month, for each 1,000 gallons.....	1.00
	"For water used for manufacturing and mechanical purposes, under 10,000 gallons per month.....	1.00
	"Above 10,000 gallons per month, per 1,000 gallons	.75
"SECTION 20.	The board of trustees have power in all cases to ascertain by meters or otherwise the quantity of water used by any consumer, and to establish a rate for that consumer in accordance with the quantity so ascertained, instead of the special rate given above.	
"SECTION 21.	For water required for purposes which are not specified in the above tariff, the rate shall be fixed by the water register.	
"SECTION 22.	The company will insert the tap and introduce the service pipe to the curbstone by their authorized tapper for.....	12.00
	"The pipe and fittings remain the property of the company.	
"SECTION 23.	All water rates payable monthly in advance.	
"SECTION 24.	The water register will, upon personal examination of the premises of any applicant for water, fix upon its rate, his decision being subject to modifications by the board of trustees.	

"SECTION 25. Payments will not be received for a less period than one month.

"Applicants for water at any time after the first day of any month shall pay their rate to the end of the following month; that all of said rates are payable monthly in advance in U. S. gold or silver coin."

20 XVIII.

Your orators further state and show that the said contract between the mayor and common council of the city of Los Angeles and the said Prudent Beaudry, S. Lazard, and John S. Griffin was duly ratified by the act of the legislature of the State of California approved April 2nd, 1870, entitled "An act to ratify certain acts and ordinances of the mayor and common council of the city of Los Angeles," and the same is still in full force.

And the said rates, so hereinbefore set forth, as agreed upon by the parties as the rates charged at the time the said contract was made, were the rates that were then so charged.

XIX.

Your orators further state and show that the said defendant, The City of Los Angeles, has ever since the making of the said contract and the assignment thereof to the said Los Angeles City Water Company recognized the existence of the contract, and has in every year demanded of the said Los Angeles City Water Company the performance of the various terms and conditions of the said contract on its part, and has, as often as the public necessity or convenience required, demanded of the said Los Angeles City Water Company the erection of fire-hydrants at the street corners, as in the said contract provided, and the said Los Angeles City Water Company has uniformly complied with the said demands and erected the said fire-hydrants, and that these demands have continued up to the time of the commencement of this action, and fire-hydrants were demanded at the same time of the passage of the ordinance fixing the rates to be charged by the said Los Angeles City Water Company in the year 1897, as hereinafter more fully set forth, and the said Los Angeles City Water Company has been during all the time and is now, upon the demand of the said city of Los Angeles and in accordance with the said contract and not otherwise, furnishing water for sprinkling the streets of Los Angeles city and for all the public uses and purposes hereinbefore mentioned free
21 of charge, and the said city has been accepting the same and making use of the waters so provided and furnished by the said Los Angeles City Water Company for the said purposes and without paying or offering to pay anything therefor to the said Los Angeles City Water Company, and it has recognized the contract obligation of the said Los Angeles City Water Company to do and perform all the said things under the said contract and has recognized and insisted upon the right of the said city of Los Angeles to

receive the benefits of the said contract aforesaid and all the benefit provided for in the said agreement.

XX.

Your orators further state and show that the said Los Angeles City Water Company has no income or revenue from any other source other than from the water rates collected by it for furnishing water to the inhabitants of the said city of Los Angeles with which to pay the rental agreed upon to the said Crystal Springs Land and Water Company for the property owned by it and by said company, leased to the said Los Angeles City Water Company, nor with which to pay the interest upon the bonded indebtedness of the said company, to secure the payment of which a trust deed was executed to the said S. G. Murphy, nor with which to continue to extend its pipes and improve its system, to meet the constantly increasing needs of the said city of Los Angeles, which said city is now increasing in population at a rapid rate, not only by the influx of immigrants to the said city, but also by the incorporating into the said city other territory than that which was within its limit at the time the said contracts were made, and the increase in the number of buildings in said city is going on at a more rapid rate than ever before in its history; that buildings are now being erected in the said city at the rate of five or six per day, and that with each new building new connections are required to be made, and as the different portions of the city increase in population and in the number of the houses to be supplied, new extensions of the pipe along other streets not yet supplied with water become necessary from time to time, and the expense
22 of keeping up with the progress of the said city and its increase of population and edifices of all sorts and of the necessity of water for sprinkling the graded streets is very great; and the said Los Angeles City Water Company has been compelled to expend, within the last three years, more than four hundred thousand dollars in laying larger pipes and extending its pipe system to tracts that had before been unsupplied with water, and that the sole source of revenue with which to pay for such improvements, repairs, maintenance, and expenses of administering the system and to pay interest on the bonds issued by it, to borrow money for such improvements, expenses, maintenance, and repairs, where the revenues of the company were too small for that purpose, is the water rates charged for furnishing water to the said inhabitants of said city.

XXI.

Your orators further state and show that the people of the State of California did, in the year 1879, adopted a constitution, to take effect on and after the 4th day of July, 1879, so far as the same related to the election of officers, the commencement of their terms, and the meeting of the legislature, and in all other respects and for all other purposes, to take effect on the first day of January,

1880, at 12 o'clock meridian, and that by the said constitution it was provided in article XIV as follows, to wit:

"ARTICLE XIV, SECTION I. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use and subject to the regulation and control of the State, in the manner to be prescribed by law; provided that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or county, or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance, or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed
23 by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions, fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action, at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation, to the city and county, or city or town, where the same are collected for the public use.

"SECTION 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise and may not be exercised except by authority of and in the manner prescribed by law."

XXII.

Your orators further state and show that the legislature of the State of California did, at its session held in 1881, claiming to be authorized by the said provisions of the constitution so to do, passed an act entitled "An act to enable the board of supervisors, town council, board of aldermen, or other legislative body of any city and county, city or town, to obtain data and information from any corporation, company or person supplying water to such city and county, city or town, requiring such boards, town council or other legislative body to perform the duties prescribed by section 1, of article XIV, of the constitution and prescribing the penalties for the nonperformance of such duties," and which said act was approved March 7th, 1881. The said act did, among other things, declare in its first section that the board of supervisors, town council, board of aldermen, or other legislative body of any city and county, or city or
24 town, were thereby authorized and empowered, and it was made their official duty, to annually fix the rates that should be charged and collected by any person, company, association, or

corporation for water furnished to any such city and county, or city or town, or the inhabitants thereof; and further enacting that such rates should be fixed at a regular or special session of such board or other legislative body during the month of February of each year, and should take effect on the 1st day of July thereafter, and should continue in full force and effect for the term of one year and no longer; and such act further provided that such legislative body of any city and county, city or town, should require by ordinance or otherwise, at least thirty days prior to the 15th day of January of each year, that any corporation, company, or person supplying water to such city and county, city or town, or to the inhabitants thereof, should furnish to such board or other governing body, in the month of January in each year, a detailed statement, verified by the oath of the president and secretary of such corporation or company or of such person, as the case might be, showing the name of each water rate payer, his or her place of residence, and the amount paid for water by each of such water-rate payers during the year preceding the date of such statement, and also showing all revenue derived from all sources, and an itemized statement of expenditures made for supplying water during said time; and it further provided in the sixth section thereof as follows:

"Rates for the furnishing of water shall be equal and uniform. There shall be no discrimination made between persons, or between persons and corporations, or as to the use of water for private and domestic and public or municipal purposes; provided, that nothing herein contained shall be so construed as to allow any person, company, association or corporation to charge any person, company, corporation or association anything for water furnished them, when by any present law such water is free."

And in the said act it was further provided, in section 7, as follows:

"Any person, company, association or corporation charging, or attempting to collect, from the persons, corporations or municipalities using water, any sum in excess of the rate fixed as hereinbefore designated, shall, upon the complaint of such board of supervisors, town council, board of aldermen, or other legislative body thereof, or of any water-rate payer, and upon conviction before any court of competent jurisdiction, shall forfeit the franchises and water works of such person, company, association or corporation to the city and county, city or town, wherein the said water is furnished and used."

And it was further provided in the said act, in section 8 thereof, that any board of supervisors, or other legislative body of any city and county, or city or town, which should fail or refuse to perform any of the duties prescribed by the said act, at the time and in the manner thereinbefore specified, should be deemed guilty of malfeasance in office, and upon conviction thereof, at the suit of any interested party, in any court of competent jurisdiction, should be removed from office.

XXIII.

And your orators further state and show that the electors of the city of Los Angeles did, in the year 1888, in pursuance of the provisions of the constitution of the State of California aforesaid, authorizing them so to do, adopt a charter for the said city, and which said charter was, under the provisions of the said constitution, submitted to the legislature of the State of California for its approval, ratification, and adoption, and the said charter was, on the 31st day of January, 1889, adopted by the said legislature of the State of California, and thereupon became and ever since has been the charter of the said city of Los Angeles, and by the said charter of the said city of Los Angeles it is provided, in section 193, as follows, to wit:

26 "The rates of compensation for use of water to be collected by any person, company, or corporation in said city shall be fixed annually by ordinance and shall continue in force for one year, and no longer. Such ordinance shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Should the council fail to pass the necessary ordinance fixing the water rates within the time thereinbefore prescribed, it shall be subject to peremptory processes to compel action, at the suit of any party interested."

XXIV.

And your orators further state and show that at the time of the grant of the franchise to the said Griffin, Beaudry, and Lazard and at the time of the organization of the said Los Angeles City Water Company and of the assignment of the said franchise to it, as hereinbefore alleged, there was no law of the State of California attaching or attempting to attach to an overcharge for water rates the penalty of the forfeiture of the property of said company, and no such condition or limitation was contained in the grant of the said franchise to the assignors of the said Los Angeles City Water Company, nor did any such condition subsequent for the defeating of the title to the property in such franchises and water works or forfeiting the same to the municipality ever exist prior to the adoption of the constitution aforesaid.

XXV.

Your orators further state and show that the said provisions of the constitution of the State of California attempting to confer upon the said legislative body of the city of Los Angeles the power to regulate the rates to be charged by the said Los Angeles City Water Company, so as to authorize them to make such regulations as to fix a lower rate than that charged at the time mentioned in the said contract, impairs the obligation of the contract made between the said city of Los Angeles and the assignors of the said Los Angeles City Water Company and the contract with the

27 said Los Angeles City Water Company and is in violation of that provision of the Constitution of the United States pro-

hibiting any State from passing any law impairing the obligation of contracts, and the provisions of the said constitution and acts of the legislature aforesaid are all in violation of the said provision of the Constitution of the United States, and are also in violation of the XIV amendment to the Constitution of the United States, prohibiting any State from depriving any person of life, liberty, or property without due process of law and prohibiting the said States from denying to any person with- *its* jurisdiction the equal protection of the laws.

And your orators further state and show that the attempt in the constitution of the State of California and the acts of the legislature to create a condition in the estate of the said Los Angeles City Water Company in its said property whereby its title is to be defeated, and which condition did not exist at the time it acquired the said property and was not contained in the grant to its assignors, is an attempt to deprive the said Los Angeles City Water Company of its property without due process of law.

XXVI.

Your orators further state and show that the said council of the city of Los Angeles did, at its meeting of February 23rd, 1897, pass an ordinance regulating the rates and compensation allowed to be collected by any person or corporation supplying water for domestic and private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1st, 1897, and ending June 30th, 1898, claiming authority under the provisions of the constitution of the State of California aforesaid and under the acts of the legislature of the State of California and the charter of the said city, hereinbefore mentioned, and by which said ordinance the rates to be charged by the said Los Angeles City Water Company were fixed at amounts far less than those charged at the date of the said contract and hereinbefore set forth, and of which said ordinance the following is a full, true, and correct copy:

28 "The mayor and council of the city of Los Angeles do ordain as follows:

"SEC. 1. That the monthly rates to be collected by any person or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic and private purposes for the year commencing July the first, 1897, and ending June thirtieth, 1898, are hereby fixed as follows:

"For every tenement or dwelling house of not exceeding three living rooms, occupied by a single family, 50 cents.

"For every tenement or dwelling house of four living rooms, occupied by a single family, 55 cents.

"For every tenement or dwelling house of five living rooms, occupied by a single family, 70 cents.

"For every tenement or dwelling house of six living rooms, occupied by a single family, 85 cents.

"For every tenement or dwelling house of seven living rooms, occupied by a single family, 90 cents.

"For every tenement or dwelling house of eight living rooms, occupied by a single family, $1.10.

"For every tenement or dwelling house of nine living rooms, occupied by a single family, $1.15.

"For every tenement or dwelling house of ten living rooms, occupied by a single family, $1.25.

"For every tenement or dwelling house of over ten living rooms occupied by a single family, for every additional room, 5 cents.

"For hotels or boarding-houses, in addition to family rates, for each boarder, ten cents.

"For lodging-houses, in addition to family rates, for each lodger, 5 cents.

"For business blocks, for each office, in addition to a basis rate of $2.00, 8 cents.

"For private fire-hydrants, each 25 cents.

29 "For restaurants and eating-houses, according to daily average of people fed, for each twenty-five people per day, $1.75.

"For bath-tubs in private residences, each tub, 15 cents, for bath-tubs in hotels and lodging-houses, for guests only, each tub 50 cents.

"For public bath-tubs, each tub $1.25.

"For public urinals, each 75 cents.

"For private urinals, each 35 cents.

"For water-closets in private residences, 15 cents.

"For public water-closets, in business blocks, 75 cents.

"For public water-closets, in stores, 35 cents.

"For public water-closets, in hotels, $1.20.

"For sprinkling lawns and gardens, .009 of a cent per front foot for lots not exceeding 150 feet depth.

"For all additional area a proportionate rate shall be charged. Provided that the sprinking rate for no yard shall be less than 25 cents. Also that when the amount of lawn or shrubbery, or both, does not exceed forty square yards, the minimum rate of 25 cents shall be charged.

"For horses kept for private use, including water for washing vehicle, one horse 15 cents; each additional horse 5 cents.

"For livery, boarding and hack stables, including water for washing vehicles, for each horse 25 cents.

"For feed and sale stables where no wash-rack is used, for each horse, 10 cents.

"For each water trough in public streets, $1.30.

"For bakeries, in addition to family rates, for each barrel of flour used, 3 cents.

"For barber shops, for each chair, 30 cents.

"For boarding schools, in addition to family rates, for each pupil, 5 cents.

"For each soda fountain 85 cents.

"For steam-engines, for each horse-power, 35 cents.

30 "For building purposes, for each 100 yards of plastering, 35 cents.

"For cement walks, for each 100 square feet, 15 cents.

"For cement curbs, for each 100 lineal feet, 30 cents.

"For each 1,000 brick laid, including wetting of brick and slacking of lime, 10 cents.

"For each saloon, not including water-closets or urinals, $1.50.

"For each water beer pump, 75 cents.

"For stores, warehouses, butcher shops, confectionery shops, halls, photograph galleries, printing offices, markets, book-binderies, blacksmith shops, and for other purposes not enumerated above, 75 cents.

"All railroads, distilleries, breweries, elevators, machine shops, manufactories and all consumers not mentioned above requiring large quantities of water shall be governed by the following

"*Meter Rates.*

"For each 100 cubic feet in quantities of 2,000 cubic feet or less, 20 cents.

"For each 100 cubic feet, over 2,000, 15 cents.

"SEC. 2. All rates except meter rates are due and payable in advance and meter rates are due and payable at the end of the month excepting that a deposit may be required thereon for not exceeding three-fourths of the estimated quantity of water used.

"SEC. 3. Any person who shall charge, demand, collect or receive, either as owner, agent, collector or employé of any water company or person furnishing water to the inhabitants of said city for domestic use or private purposes, any rate or compensation for water furnished to the inhabitants of the city of Los Angeles in excess of the rates fixed by this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not to exceed $100.00 or shall be imprisoned in the city jail for a term not exceeding ninety days or shall suffer both such fine and imprisonment.

"SEC. 4. The city clerk shall certify to the passage of this ordinance and shall cause it to be published once in the Los Angeles Evening Express and thereupon and thereafter it shall take effect and be in force.

"I hereby certify that the foregoing ordinance was adopted by the council of the city of Los Angeles at its meeting of February 23rd, 1897.

"(Signed) C. H. HANCE,
"*City Clerk.*"

And your orators further state and show that under the provisions of the said ordinance and at the rates therein fixed the revenues of the said Los Angeles City Water Company will be reduced more than forty per cent. below the amount which it would receive at the said rates charged in 1868, and hereinbefore set forth, for the same services, and its ability to make the necessary extensions and construct the necessary improvements to meet the wants and keep up with the progress of the said city of Los Angeles will be greatly impaired, and the amount of rent that the said Crystal Spring

Land and Water Company would receive will be forty per cent. less than it is entitled to receive, and the ability of the said Los Angeles City Water Company to pay its interest upon the outstanding bonds and maintain the operating expenses and repairs and improvements necessary for the proper administration of its system, and to comply with the contract made by it and its assignors with the said city of Los Angeles, will be greatly impaired, and the said company will not only be deprived of the revenues which it ought to receive, but will be unable to carry on its said business and to properly perform the contract hereinbefore set forth and the terms thereof on its part to be performed.

XXVII.

Your orators further state and show that if, when the said ordinance goes into effect, according to its terms, the said Los Angeles City Water Company should attempt to charge more than the
32 rates so fixed, your orators are informed and believe, and therefore allege, that the said city of Los Angeles would claim that the property of the said Los Angeles City Water Company was forfeited to the said city, and would attempt to enforce such forfeiture; and your orators cannot maintain the rights which they possess under the said several contracts hereinbefore set forth except at the peril of the loss of the said property and the certainty of their being greatly interfered with by the said city of Los Angeles in their attempts to maintain and operate the same.

XXVIII.

Your orators further state and show that the matter in dispute in this action exceeds, exclusive of interest and costs, the sum or value of one hundred and fifty thousand dollars.

To the end, therefore, that your orators may obtain relief in the premises in this court (where alone adequate relief can be afforded), they pray that the said City of Los Angeles may be required to answer the allegations of this bill (but not under oath, an answer under oath being waived), and that upon the final hearing of this cause it be decreed that the said ordinance passed on February 23rd, 1897, by the said council of the city of Los Angeles, fixing the water rates to be charged by the said Los Angeles City Water Company for furnishing water to the said city and to the inhabitants, is null and void, and that the same is in violation of the contract rights of the said Los Angeles City Water Company and of these plaintiffs, and that the said council be commanded to regulate the water rates to be charged by the said Los Angeles City Water Company, but in such manner and for such rates fixed by it as that they shall not so reduce such water rates or so fix the prices therefor to be less than those charged by the said Griffin, Beaudry, and Lazard at the time of the execution of the said contract on the 22nd day of July, A. D. 1868, and which said rates are set forth in the said bill, and for a decree enjoining the said council of the
33 city of Los Angeles from fixing the said water rates at any less amount until the determination of the said contract, and

that your orators may obtain the relief prayed for and all such further or other relief as the nature of the case may require, may it please your honors to grant to your orators the writ of subpœna against the said City of Los Angeles.

WHITE AND MONROE AND
J. S. CHAPMAN,
Solicitors for Complainants.

UNITED STATES OF AMERICA,
District of Southern California.

At the city of Los Angeles, in the county of Los Angeles and district aforesaid, this 27th day of February, in the year A. D. 1897, personally appeared before me, Ward Chapman, a notary public in and for said county of Los Angeles, State of California, S. H. Mott, the secretary of the Los Angeles City Water Company and also of the Crystal Springs Land and Water Company, and made oath that the facts set forth in the foregoing bill, so far as they purport to be stated as of his own knowledge, are true, and so far as they purport to be stated on information and belief he believes them to be true.

S. H. MOTT.

Subscribed and sworn to before me this 27th day of February, 1897.

WARD CHAPMAN,
[SEAL.] *Notary Public in and for the County of Los Angeles, State of California.*

(Endorsed:) No. 734. In the United States circuit court, ninth circuit, southern district of California. Los Angeles City Water Co. *et al.*, plaintiffs, *vs.* City of Los Angeles *et al.*, defendant-. Bill of complaint. Filed Mar. 4, 1897. Wm. M. Van Dyke, clerk. White & Monroe and Jno. S. Chapman, attorneys for complainants.

34 5, 6, '96—250.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Southern District of California. In Equity.

The President of the United States of America to the City of Los Angeles, Herman Silver, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, composing the council of the city of Los Angeles, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room, in Los Angeles, on the fifth day of April, A. D. 1897, to answer to a bill of complaint exhibited against you in said court by the Los Angeles City Water Company, a corporation organized under and in pursuance of the laws of the State of California and having its princi-

pal place of business in the city of Los Angeles, county of Los Angeles, in said State, and the Crystal Springs Land and Water Company, a corporation organized under and in pursuance of the laws of the said State of California and having its principal place of business in the city of Los Angeles, and S. G. Murphy, who is a citizen of the State of California, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of five thousand dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of March, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the one hundred and twenty-first.

[SEAL.] WM. M. VAN DYKE, *Clerk*,
By —— ——, *Deputy Clerk*.

35 *Memorandum Pursuant to Rule* 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit on or before the first Monday of April next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

WM. M. VAN DYKE, *Clerk*,
By —— ——, *Deputy Clerk*.

UNITED STATES MARSHAL'S OFFICE,
SOUTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 4th day of March, 1897, and personally served the same on the 4th day of March, 1897, on the City of Los Angeles, Herman Silver, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, composing the council of the city of Los Angeles, by delivering to and leaving with each, M. P. Snyder, mayor of the city of Los Angeles; Herman Silver, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, said defendants named therein, personally, at the county of Los Angeles, in said district, a certified copy thereof, certified to by Wm. M. Van Dyke, Esq., clerk, &c.

N. A. COVARRUBIAS,
U. S. Marshal,
By —— ——, *Deputy*.

Los Angeles, March 5th, 1897.

(Endorsed:) Original. No. 734. U. S. circuit court, ninth circuit, southern district of California. In equity. Los Angeles City Water Company *et al. vs.* The City of Los Angeles *et al.* Subpœna. Filed Mar. 5, 1897. Wm. M. Van Dyke, clerk.

36 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS Land and Water Company, and S. G. Murphy, Complainants,
vs.
THE CITY OF LOS ANGELES, HERMAN SILVER, ET AL., Composing the Council of the City of Los Angeles, Defendants.
} No. 734.

Now come the above-named defendant, The City of Los Angeles, and takes the exceptions hereinafter set forth to the bill of complaint of complainants for expunging the impertinent matter therein contained.

1st. Defendants except to the whole of paragraph VIII, pages 8 and 9 of said bill, for that the same is impertinent.

2nd. Defendants except to the whole of paragraph IX, page 9 of said bill, for that the same is impertinent.

3rd. Defendants except to the whole of paragraph X, pages 9 and 10 of said bill, for that the same is impertinent.

4th. Defendants except to the whole of paragraph XI, pages 10 and 11 of said bill, for that the same is impertinent.

5th. Defendants except to the whole of paragraph XII, pages 11 and 12, for that the same is impertinent.

6th. Defendants except to the whole of paragraph XIII, pages 12 and 13 of said bill, for that the same is impertinent.

7th. Defendants except to the whole of paragraph XIV, page 14 of said bill, for that the same is impertinent.

8th. Defendants except to the whole of paragraph XV, page 14 of said bill, for that the same is impertinent.

9th. Defendants except to all that portion of paragraph XVI of said bill from the commencement of said paragraph in line
37 27, page 14, down to and including the word "thereof," in line 10, page 15, for that the same is impertinent.

10th. Defendants except to the whole of paragraph XIX, pages 20 and 21 of said bill, for that the same is impertinent.

11th. Defendants except to all that portion of paragraph XXVI of said bill, commencing with the word "and," in line 4, page 31, and ending with the word "receive," in line 6, page 31 of said bill, for that the same is impertinent.

In all of which particulars these exceptants except to said bill as impertinent and pray that the said impertinent matter may be expunged therefrom.

W. E. DUNN,
Solicitor for Defendants.
LEE AND SCOTT, *Of Counsel.*

(Endorsed:) No. 734. In the circuit court of the United States, ninth circuit, southern dist. of California. Los Angeles City Water Co. *et als.*, comp'ts, *vs.* Los Angeles City. Service admitted June 7,

1897. White & Monroe, J. S. Chapman, att'y- for complainants. Filed Jun- 7, 1897. Wm. M. Van Dyke, clerk. Lee & Scott, attorneys-at-law, Los Angeles, California.

38 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS Land and Water Company, and S. G. Murphy, Complainants,
vs.
THE CITY OF LOS ANGELES, HERMAN SILVER, ET AL., Composing the Council of the City of Los Angeles, Defendants. } No. 734.

Now come the above-named defendants, Herman Silver *et als.*, composing the council of the city of Los Angeles, and take the exceptions hereinafter set forth to the bill of complaint of complainants for expunging the impertinent matter therein contained.

1st. Defendants except to the whole of paragraph VIII, pages 8 and 9 of said bill, for that the same is impertinent.

2nd. Defendants except to the whole of paragraph IX, page 9 of said bill, for that the same is impertinent.

3rd. Defendants except to the whole of paragraph X, pages 9 and 10 of said bill, for that the same is impertinent.

4th. Defendants except to the whole of paragraph XI, pages 10 and 11 of said bill, for that the same is impertinent.

5th. Defendants except to the whole of paragraph XII, pages 11 and 12, for that the same is impertinent.

6th. Defendants except to the whole of paragraph XIII, pages 12 and 13 of said bill, for that the same is impertinent.

7th. Defendants except to the whole of paragraph XIV, page 14 of said bill, for that the same is impertinent.

8th. Defendants except to the whole of paragraph XV, page 14 of said bill, for that the same is impertinent.

39 9th. Defendants except to all that portion of paragraph XVI of said bill from the commencement of said paragraph, in line 27, page 14, down to and including the word "thereof," in line 10, page 15, for that the same is impertinent.

10th. Defendants except to the whole of paragraph XIX, pages 20 and 21 of said bill, for that the same is impertinent.

11th. Defendants except to all that portion of paragraph XXVI of said bill commencing with the word "and," in line 4, page 31, and ending with the word "receive," in line 6, page 31, of said bill for that the same is impertinent.

In all of which particulars these exceptants except to said bill as impertinent, and pray that the said impertinent matter may be expunged therefrom.

W. E. DUNN,
Solicitor for Defendants.
LEE AND SCOTT, *Of Counsel.*

(Endorsed:) No. 734. In the circuit court of the United States, ninth circuit, southern district of California. Los Angeles City Water Co. *et als.*, compl't-, *vs.* City of Los Angeles *et als.*, def'ts. Defendants' exceptions to complainants' bill of complaint. Service admitted this 7 day of June, 1897. White & Monroe, J. S. Chapman, att'ys for compl'ts. Filed Jun- 7, 1897. Wm. M. Van Dyke, clerk. W. E. Dunn and Lee & Scott, Los Angeles, California, sols for def'ts.

40 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

LOS ANGELES CITY WATER COMPANY, Crystal Springs Land & Water Company, and S. G. Murphy, Complainants,
vs.
THE CITY OF LOS ANGELES, HERMAN Silver, *et al.*, Composing the Council of the City of Los Angeles, Defendants.

No. 734. Demurrer of the City of Los Angeles, Defendant.

This defendant, The City of Los Angeles, not confessing all or any of the matters in the bill of complaint contained to be true as therein set forth, and not waiving the exceptions to said bill of complaint this day served and filed herein, but saving and reserving to itself any and all advantages that may or might be taken by said exceptions to said bill, does demur to said bill on the following grounds:

I. For that the same does not state such a case nor contain any matter of equity entitling the complainants, or any of them, to any relief against this defendant.

II. For that the subject of this suit is not within the jurisdiction of this court, nor has the court jurisdiction of the subject-matter of said bill or of the parties thereto or any of them.

III. For that several distinct and independent matters and causes which have no relation to each other, and in which or in the greater part of which this defendant is in no way interested, or connected and ought not to be implicated, and by reason of such distinct matters the said bill is drawn out to a considerable length and this defendant is compelled to take a copy of the whole thereof,

41 and by joining distinct matters together which do not depend on each other the proceedings in the progress of the said suit will be intricate and prolix and this defendant put to unnecessary charges and expenses in matters which in no way relate to or concern this defendant or tend to sustain the cause or causes of complaint set forth in said bill, and particularly in this: that there is set forth in said bill a statement of the title of the complainants Crystal Springs Land and Water Company and S. G. Murphy, trustee, to certain waters in said bill described, with a history of the mode of acquiring such title, which matter is wholly un-

necessary to sustaining the complainant's cause of relief against the ordinance sought in said bill to be set aside, either on the ground that such ordinance is in violation of the alleged contract between the defendant The City of Los Angeles and Griffin, Lazard, and Beaudry, set forth in said bill, or because the same reduces the water rate therein provided for below a reasonable charge.

IV. The complainant Crystal Springs Land and Water Company is improperly joined with the complainant Los Angeles City Water Company, inasmuch as it appears from the said bill that said Crystal Springs Land and Water Company has no interest in the subject-matter of said bill or in the relief sought to be obtained thereby, and the complainant S. G. Murphy is improperly joined with each of the other complainants in said bill, inasmuch as it appears that said S. G. Murphy has no interest in the subject-matter of said bill or in the relief sought to be obtained thereby.

V. For that said bill is vague and uncertain, in this: that the equitable right upon which the complainants rely for relief is not stated with sufficient clearness, nor does it appear from said bill whether the complainants rely for such relief upon the allegations of said bill tending to show that the ordinance sought in said bill to be set aside is in violation of the contract between the defendant The City of Los Angeles and Griffin, Beaudry, and Lazard, mentioned in said bill, or upon the allegations tend-
42 ing to show that said ordinance reduced the water rates therein provided for below a reasonable charge; and in this: that it does not appear therefrom whether or not complainants intend to state a cause of complaint that the water rates established by the ordinance sought in said bill to be set aside have the effect of reducing the compensation received by complainant Los Angeles City Water Company for furnishing water to this defendant and its inhabitants below a reasonable amount or below an amount necessary to yield said complainant a reasonable interest on the capital invested in its property or on the value thereof; and in this: that it does not appear from said bill whether the transfer of said contract alleged in said bill to have been made by the said Griffin, Beaudry, and Lazard to the complainant Los Angeles City Water Company was made prior to or subsequent to the act of the legislature approved April 2nd, 1870, mentioned in said bill, or whether or not said act of the legislature inured to the benefit of the complainant Los Angeles City Water Company, or whether or not the same had already inured to the benefit of the said Griffin, Beaudry, and Lazard; and in this: that it cannot be ascertained from said bill whether or not the water rates fixed in said ordinance sought in said bill to be set aside reduced such water rates below a reasonable charge or so reduced said water rates as not to allow to the complainant Los Angeles City Water Company a reasonable compensation for said water and a reasonable interest upon the amount of the capital invested in the water works or what compensation is allowed to the complainant Los Angeles City Water Company for the water supplied by it to the defendant The City of Los Angeles and its inhabitants, or what expenses are incurred by the complain-

ant Los Angeles City Water Company in maintaining the said water works and furnishing water to said defendant, The City of Los Angeles, and its inhabitants, or what interest the bonded indebtedness mentioned in paragraph sixteen bears, or whether or not the net revenue derived by the complainant Los Angeles
43 City Water Company from the water rates allowed in said last-mentioned ordinance is not sufficient to enable it to pay the said interest, besides the other expenses of maintaining its water works and supplying water to the defendant The City of Los Angeles and its inhabitants.

VI. For that there is a misjoinder of parties defendant in said bill of complaint herein, in this: that this defendant, The City of Los Angeles, is improperly joined herein with Herman Silver and the other defendants composing the council of the city of Los Angeles.

VII. For that there is a misjoinder of parties defendant in said bill of complaint herein, in this: that the said defendants, Herman Silver *et als.*, composing the council of the city of Los Angeles, are improperly joined herein with this defendant.

And this defendant, not confessing all or any of the matters in the bill of complaint contained to be true as therein set forth, and not waiving the exceptions to said bill of complaint this day served and filed herein, but saving and reserving to itself any and all advantages that may or might be taken by said exceptions to said bill, demur further to that part and those portions of said bill setting forth the alleged contract between the defendant The City of Los Angeles and Griffin, Beaudry, and Lazard and the matters and things done by said Griffin, Beaudry, and Lazard and the complainant Los Angeles City Water Company and the defendant The City of Los Angeles in regard to said alleged contract, the same containing a statement of the complainants' cause of complaint that the ordinance sought in the bill of complaint to be set aside and adopted by authority of the provision of the constitution of the State of California set forth in said bill impairs the obligation of said contract and is in violation of the Constitution of the United States, for that the same does not state such a case nor contain any matter of equity entitling the complainants to any relief against defendant.

44 And this defendant, not confessing all or any of the matters in the bill of complaint to be true as therein set forth, and not waiving the exceptions to said bill of complaint this day served and filed herein, but saving and reserving to itself any and all advantages that may or might be taken by said exceptions to said bill, demur further to that part and those portions of said bill containing a statement of complain-ts' cause of complaint; that the ordinance sought in the bill of complaint to be set aside and adopted by authority of the provisions of the constitution of the State of California set forth in said bill deprives the complainants of their property without due process of law in reducing the water rates established by said ordinance below a reasonable charge, for that the same does not state such a case nor contain any matter of equity entitling the complainants to any relief against this defendant.

And does further demur to paragraph six of said bill of complaint

for that said paragraph is vague and uncertain, in this: that it cannot be ascertained therefrom when the assignment therein referred to was made, or whether or not such assignment was made prior or subsequent to the passage of the act of the legislature of this State mentioned in paragraph eighteen of said bill, or whether or not the complainant Los Angeles City Water Company held said contract at the time of the passage of said act.

And does further demur to paragraph seven of said bill of complaint for that said paragraph is vague and uncertain, in this: that it does not appear therefrom what acts were done by Beaudry, Lazard, and Griffin and the complainant Los Angeles City Water Company in performance of the terms and conditions of the contract referred to in said paragraph, or how they have performed all of the terms and conditions of said contract on their part to be performed.

And does demur to paragraph fifteen of said bill of complaint for that the same is vague and uncertain, in this: that it does
45 not appear therefrom for what purpose the expenditure of $3,000,000.00 was made, as therein alleged, or whether or not the same was made for permanent improvements, or whether or not the whole or a portion thereof was made for repairs to supply deteriorations occasioned by ordinary wear and tear, or what is the value of the water works of complainants, or what is the amount of the capital invested or value of the property upon which a reasonable interest should be allowed complainants for furnishing water to the defendant The City of Los Angeles and its inhabitants.

And does demur to that portion of paragraph sixteen of said bill of complaint alleging a bonded indebtedness, for that the same is vague and uncertain, in this: that it does not appear therefrom what interest the bonded indebtedness therein mentioned bears.

And does further demur to that portion of paragraph twenty-six of said bill of complaint alleging that the revenues of complainant Los Angeles City Water Company will be reduced forty per cent. below the amount which it would receive at the rates charged in 1868 for the same services, and that its ability to make the necessary extensions and to construct the necessary improvements to meet the wants and keep up with the progress of the city of Los Angeles will be greatly impaired, and its ability to pay its interest on outstanding bonds and maintain the operating expenses and repairs and improvements necessary for the proper administration of its system and to comply with said contract will be greatly impaired, and that said company will not only be deprived of the revenues which it ought to receive, but will be unable to carry on its said business and to properly perform said contract, for that the same is vague and uncertain, in this: that it does not appear therefrom how much the revenues of said complainant, Los Angeles City Water Company, will be reduced, nor to what extent or how its ability to make said extensions and construct said improvements will be impaired, nor to what extent or how its ability to pay said interest and maintain said expenses and repairs and improvements will be
46 impaired, nor how it will be unable to carry on said business or perform said contract, nor what are the revenues derived

by said company from the sale of water supplied to said defendant, The City of Los Angeles, and its inhabitants, nor what are the expenses of complainant in supplying water to said defendant, The City of Los Angeles, and its inhabitants.

Wherefore, and for divers other errors and imperfections appearing in said bill, this defendant demands the judgment of this court whether it shall be compelled to further answer said bill or said portions of said bill hereinbefore demurrer to, and it prays to be hence dismissed with its reasonable costs in this behalf sustained.

W. E. DUNN,
LEE AND SCOTT,
Solicitor- and Counsellors for Defendant.

We hereby certify that the foregoing demurrer is, in our opinion, well founded in point of law.

LEE AND SCOTT,
Counsel for Defendant.

STATE OF CALIFORNIA, }
County of Los Angeles, } *ss:*

C. H. Hance, being first duly sworn, on oath says that he is an officer of the city of Los Angeles, to wit, the city clerk thereof, and as such makes this affidavit for and on behalf of said city of Los Angeles, and that the foregoing demurrer is not interposed for delay.

C. H. HANCE.

Subscribed and sworn to before me this 7th day of June, A. D. 1897.

[SEAL.]

S. M. HASKINS,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) Original. No. 734. U. S. circuit court, 9th circuit, so. dist. of Cal. Los Angeles county, State of California. Los Angeles City Water Co. *et als.*, complainants, *vs.* City of Los Angeles, defendants. Demurrer of City of Los Angeles. Received
47 copy of within this 7 day of June, 1897. White & Monroe, J. S. Chapman, sol. for complainants. Filed Jun- 7, 1897. Wm. M. Van Dyke, clerk. W. E. Dunn, Lee and Scott, for defendants.

48 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS LAND & WATER COMPANY, and S. G. MURPHY, Complainants,
vs.
THE CITY OF LOS ANGELES, HERMAN SILVER, *et al.*, Composing the Council of the City of Los Angeles, Defendants.

No. 734. Demurrer of Herman Silver *et als.*, Defendants.

These defendants, Herman Silver *et al.*, composing the council of the city of Los Angeles, not confessing all or any of the matters in the bill of complaint contained to be true as therein set forth, and not waiving the exceptions to said bill of complaint this day served and filed herein, but saving and reserving to *itself* any and all advantages that may or might be taken by said exceptions to said bill, do*es* demur to said bill on the following grounds:

I. For that the same does not state such a case nor contain any matter of equity entitling the complainants or any of them to any relief against these defendants.

II. For that the subject of this suit is not within the jurisdiction of this court, nor has the court jurisdiction of the subject-matter of said bill or of the parties thereto or any of them.

III. For that several distinct and independent matters and causes which have no relation to eac*t* other, and in which or in the greater part of which these defendants are in no way interested, *or* connected and ought not to be implicated, and by reason of such distinct matters said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof,
49 and by joining distinct matters together which do not depend on each other the proceedings in the progress of the said suit will be intricate and prolix and these defendants put to unnecessary charges and expenses in matters which in no way relate to or concern these defendants or tend to sustain the cause or causes of complaint set forth in said bill, and particularly in this: that there is set forth in said bill a statement of the title of the complainants Crystal Springs Land and Water Company and S. G. Murphy, trustee, to certain waters in said bill described, with a history of the mode of acquiring such title, which matter is wholly unnecessary to sustaining the complainants' cause of relief against the ordinance sought in said bill to be set aside, either on the ground that such ordinance is in violation of the alleged contract between the defendant The City of Los Angeles and Griffin, Lazard, and Beaudry, set forth in said bill, or because the same reduces the water rate therein provided for below a reasonable charge.

IV. The complainant Crystal Springs Land and Water Company is improperly joined with the complainant Los Angeles City Water Company, inasmuch as it appears from the said bill that said Crystal Springs Land and Water Company has no interest in the subject-matter of said bill or in the relief sought to be obtained thereby,

and the complainant S. G. Murphy is improperly joined with each of the other complainants in said bill, inasmuch as it appears that said S. G. Murphy has no interest in the subject-matter of said bill or in the relief sought to be obtained thereby.

V. For that said bill is vague and uncertain, in this: that the equitable right upon which the complainants rely for relief is not stated with sufficient clearness, nor does it appear from said bill whether the complainants rely for such relief upon the allegations of said bill tending to show that the ordinance sought in said bill to be set aside is in violation of the contract between the defendant The City of Los Angeles and Griffin, Beaudry, and Lazard, mentioned in said bill, or upon the allegations tending
50 to show that said ordinance reduced the water rates therein provided for below a reasonable charge, and in this: that it does not appear therefrom whether or not complainants intend to state a cause of complaint that the water rates established by the ordinance sought in said bill to be set aside have the effect of reducing the compensation received by complainant Los Angeles City Water Company for furnishing water to this defendant and its inhabitants below a reasonable amount or below an amount necessary to yield said complainant a reasonable interest on the capital invested in its property or on the value thereof, and in this: that it does not appear from said bill whether the transfer of said contract alleged in said bill to have been made by the said Griffin, Beaudry, and Lazard to the complainant Los Angeles City Water Company was made prior to or subsequent to the act of the legislature approved April 2nd, 1870, mentioned in said bill, or whether or not said act of the legislature inured to the benefit of the complainant Los Angeles City Water Company, or whether or not the same had already inured to the benefit of the said Griffin, Beaudry, and Lazard, and in this: that it cannot be ascertained from said bill whether or not the water rates fixed in said ordinance sought in said bill to be set aside reduced such water rates below a reasonable charge or so reduced said water rates as not to allow to the complainant Los Angeles City Water Company a reasonable compensation for said water and a reasonable interest upon the amount of the capital invested in the water works, or what compensation is allowed to the complainant Los Angeles City Water Company for the water supplied by it to the defendant The City of Los Angeles and its inhabitants, or what expenses are incurred by the complainant Los Angeles City Water Company in maintaining the said water works and furnishing water to said defendant, The City of Los Angeles, and its inhabitants, or what interest the bonded indebtedness mentioned in paragraph sixteen bears, or whether or not the net
51 revenue derived by the complainant Los Angeles City Water Company from the water rates allowed in said last-mentioned ordinance is not sufficient to enable it to pay the said interest besides the other expenses of maintaining its water works and supplying water to the defendant The City of Los Angeles and its inhabitants.

VI. For that there is a misjoinder of parties defendant in said bill of complaint herein, in this: that these defendants are improperly joined with the said defendant, The City of Los Angeles.

VII. For that there is a misjoinder of parties defendant in said bill of complaint herein, in this: that the defendant The City of Los Angeles is improperly joined with these defendants.

And these defendants, not confessing all or any of the matters in the bill of complaint contained to be true as therein set forth and not waiving the exceptions to said bill of complaint this day served and filed herein, but saving and reserving to themselves any and all advantages that may or might be taken by said exceptions to said bill, demur further to that part and those portions of said bill setting forth the alleged contract between the defendant The City of Los Angeles and Griffin, Beaudry, and Lazard and the matters and things done by said Griffin, Beaudry, and Lazard and the complainant Los Angeles City Water Company and the defendant The City of Los Angeles in regard to said alleged contract, the same containing a statement of the complainants' cause of complaint; that the ordinance sought in the bill of complaint to be set aside and adopted by authority of the provisions of the constitution of the State od California, set forth in said bill, impairs the obligation of said contract and is in violation of the Constitution of the United States, for that the same does not state such a case nor contain any matter of equity entitling the complainants to any relief against defendant-.

And these defendants, not confessing all or any of the matters in the bill of complaint to be true as therein set forth, and not waiving the exceptions to said bill of complaint this day served
52 and filed herein, but saving and reserving to themselves any and all advantages that may or might be taken by said exceptions to said bill, demur further to that part and those portions of said bill containing a statement of complain-ts' cause of complaint; that the ordinance sought in the bill of complaint to be set aside and adopted by authority of the provisions of the constitution of the State of California, set forth in said bill, deprives the complainants of their property without due process of law in reducing the water rates established by said ordinance below a reasonable charge, for that the same does not state such a case nor contain any matter of equity entitling the complainants to any relief against these defendants.

And do further demur to paragraph six of said bill of complaint, for that said paragraph is vague and uncertain, in this: that it cannot be ascertained therefrom when the assignment therein referred to was made, or whether or not such assignment was made prior or subsequent to the passage of the act of the legislature of this State mentioned in paragraph eighteen of said bill, or whether or not the complainant Los Angeles City Water Company held said contract at the time of the passage of said act.

And do further demur to paragraph seven of said bill of complaint, for that said paragraph is vague and uncertain, in this: that

it does not appear therefrom what acts were done by Beaudry, Lazard, and Griffin and the complainant Los Angeles City Water Company in performance of the terms and conditions of the contract referred to in said paragraph or how they have performed all of the terms and conditions of said contract on their part to be performed.

And do demur to paragraph fifteen of said bill of complaint, for that the same is vague and uncertain, in this: that it does not appear therefrom for what purpose the expenditure of $3,000,000.00 was made, as therein alleged, or whether or not the same was made for permanent improvements, or whether or not the whole or a portion thereof was made for repairs to supply deteriorations
53 occasioned by ordinary wear and tear, or what is the value of the water works of complainant, or what is the amount of the capital invested or value of the property upon which a reasonable interest should be allowed complainants for furnishing water to the defendant The City of Los Angeles and its inhabitants

And do demur to that portion of paragraph sixteen of said bill of complaint alleging a bonded indebtedness, for that the same is vague and uncertain, in this: that it does not appear therefrom what interest the bonded indebtedness therein mentioned bears.

And do further demur to that portion of paragraph twenty-six of said bill of complaint alleging that the revenues of complainant Los Angeles City Water Company will be reduced forty per cent. below the amount which it would receive at the rates charged in 1868 for the same services, and that its ability to make the necessary extensions and to construct the necessary improvements to meet the wants and keep up with the progress of the city of Los Angeles will be greatly impaired, and its ability to pay its interest on outstanding bonds and maintain the operating expenses and repairs and improvements necessary for the proper administration of its system and to comply with said contract will be greatly impaired, and that said company will not only be deprived of the revenues which it ought to receive, but will be unable to carry on its said business and to properly perform said contract, for that the same is vague and uncertain, in this: that it does not appear therefrom how much the revenues of said complainant, Los Angeles City Water Company, will be reduced, nor to what extent or how its ability to make said extensions and construct said improvements will be impaired, nor to what extent or how its ability to pay said interest and maintain said expenses and repairs and improvements will be impaired, nor how it will be unable to carry on said business or perform said contract, nor what are the revenues derived by said company from the sale of water supplied to said defendant, The City of Los Angeles, and its inhabitants, nor what are the expenses of complainant in supplying water to said defendant, The City of Los Angeles, and its inhabitants.

54 Wherefore, and for divers other errors and imperfections appearing in said bill, these defendants demands the judgment of this court whether they or any of them shall be compelled to further answer said bill or said portions of said bill hereinbefore

demurred to, and they pray to be hence dismissed with reasonable costs in this behalf sustained.

W. E. DUNN,
LEE AND SCOTT,
Solicitor- and Counsellors for Defendant.

We hereby certify that the foregoing demurrer is in our opinion well founded in point of law.

LEE AND SCOTT,
Counsel for Defendant.

STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

Herman Silver, being first duly sworn, on oath says that he is one of the defendants in the above-entitled action, to wit, one of the members of said city council, and as such makes this affidavit for and in behalf of himself and his said codefendants, comprising the council of the city of Los Angeles, and that the foregoing demurrer is not interposed for delay.

HERMAN SILVER.

Subscribed and sworn to before me this 7th day of June, A. D. 1897.

[SEAL.] S. M. HASKINS,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) Original. No. 734. U. S. circuit court, 9 circuit, so. dist. of Cal., Los Angeles county, State of California. Los Angeles City Water Co. *et als.*, complainants, *vs.* City of Los Angeles, defendants. Demurrer of Herman Silver *et al.*, city council. Received copy of within this 7th day of June, 1897. White & Monroe, J. S. Chapman, sols. for complainants. Filed Jun- 7, 1897. Wm. M. Van Dyke, clerk. W. E. Dunn, Lee and Scott, sls. for defendants.

55 At a stated term, to wit, the January term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Tuesday, the fifteenth day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Olin Wellborn, district judge.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants,
vs.
THE CITY OF LOS ANGELES ET AL., Defendants. } No. 734.

This cause having heretofore been submitted to the court for its consideration and decision upon the exception of the defendant The City of Los Angeles to the bill of complaint of complainants

for expunging the impertinent matter therein contained, and the court having duly considered the same and being fully advised in the premises, it is now, on this 15th day of June, 1897, being a day in the January term, A. D. 1897, of the circuit court of the United States for the southern district of California, ordered that of said exceptions the 4th and 5th be, and hereby are, allowed, and that the others be, and hereby are, overruled.

I, Wm. M. Van Dyke, clerk of the circuit court of the United States for the southern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said court June 15th, 1897, in the cause entitled Los Angeles City Water Company *et al.*, complainants, *vs.* The City of Los Angeles *et al.*, defendants, No. 734, and remaining of record therein.

Attest my hand and the seal of said circuit court this 20th day of June, A. D. 1898.

[SEAL.] WM. M. VAN DYKE, *Clerk.*

56 (Endorsed:) No. 734. U. S. circuit court, ninth circuit, southern district of California. Los Angeles City Water Company *et al. vs.* The City of Los Angeles *et al.* Certified copy order allowing 4th & 5th exceptions of defendant The City of Los Angeles to bill of complaint. Filed Jun- 20, 1898. Wm. M. Van Dyke, clerk.

57 At a stated term, to wit, the January term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Tuesday, the fifteenth day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Olin Wellborn, district judge.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants, *vs.* THE CITY OF LOS ANGELES ET AL., Defendants. } No. 734.

This cause having heretofore been submitted to the court for its consideration and decision upon the exceptions of the defendants Herman Silver *et al.*, composing the council of the city of Los Angeles, to the bill of complaint of complainants for expunging the impertinent matter therein contained, and the court having duly considered the same and being fully advised in the premises, it is now, on this 15th day of June, 1897, being a day in the January term, A. D. 1897, of the circuit court of the United States for the southern district of California, ordered that of said exceptions the 4th and 5th be, and hereby are, allowed, and that the others be, and hereby are, overruled.

I, Wm. Van Dyke, clerk of the circuit court of the United States for the southern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said court June 15th, 1897, in the cause entitled Los Angeles City Water Company *et al.*, complainants, *vs.* The City of Los Angeles *et al.*, defendants, No. 734, and remaining of record therein.

58 Attest my hand and the seal of said circuit court this 20th day of June, A. D. 1898.

[SEAL.] WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 734. U. S. circuit court, ninth circuit, southern district of California. Los Angeles City Water Company *et al. vs.* The City of Los Angeles *et al.* Certified copy order allowing 4th and 5th exceptions of defendants Herman Silver *et al.* to bill of complaint. Filed Jun- 20, 1898. Wm. M. Van Dyke, clerk.

59 At a stated term, to wit, the January term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Monday, the twenty-first day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Olin Wellborn, district judge.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants, *vs.* THE CITY OF LOS ANGELES ET AL., Defendants. } No. 734.

It is ordered that the order of the court made and entered on the 15th day of June, 1897, allowing the 4th and 5th exceptions taken by the defendant The City of Los Angeles to complainants' bill of complaint be, and the same hereby is, amended so as to read as follows: This cause having heretofore been submitted to the court for its consideration and decision upon the exceptions of the defendant The City of Los Angeles to the bill of complaint of complainants for expunging the impertinent matter therein contained, and the court having duly considered the same and being fully advised in the premises, it is now, on this 15th day of June, 1897, being a day in the January term, A. D. 1897, of the circuit court of the United States for the southern district of California, ordered that of said exceptions the 4th and 5th be, and hereby are, allowed, and that the others be, and hereby are, overruled; to which rulings of the court the respective parties, complainant and defendant, are allowed exceptions.

60 I, Wm. M. Van Dyke, clerk of the circuit court of the United States for the southern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said court June 21st, 1897, in the

cause entitled Los Angeles City Water Company *et al.*, complainants, *vs.* The City of Los Angeles *et al.*, defendants, No. 734, and remaining of record therein.

[SEAL.] Attest my hand and the seal of said circuit court this 20th day of June, A. D. 1898.

WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 734. U. S. circuit court, ninth circuit, southern district of California. Los Angeles City Water Company *et al. vs.* The City of Los Angeles *et al.* Certified copy order amending order of June 15th, 1897. Filed Jun- 20, 1898. Wm. M. Van Dyke, clerk.

61 At a stated term, to wit, the January term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Monday, the twenty-first day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Olin Wellborn, district judge.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants,
vs.
THE CITY OF LOS ANGELES ET AL., Defendants. } No. 734.

It is ordered that the order of court made and entered herein on the 15th day of June, 1897, allowing the 4th and 5th exceptions taken by the defendants Herman Silver *et al.*, composing the council of the city of Los Angeles, to complainants' bill of complaint be, and the same hereby is, amended so as to read as follows: This cause having heretofore been submitted to the court for its consideration and decision upon the exceptions of the defendants Herman Silver *et als.*, composing the council of the city of Los Angeles, to the bill of complaint of complainants for expunging the impertinent matter therein contained, and the court having duly considered the same and being fully advised in the premises, it is now, on this 15th day of June, 1897, being a day in the January term, A. D. 1897, of the circuit court of the United States for the southern district of California, ordered that of said exceptions the 4th and 5th be, and hereby are, allowed, and that the others be, and hereby are, overruled; to which rulings of the court the respective parties, complainants and defendants, are allowed exceptions.

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Attest my hand and the seal of said circuit court this 20th day of June, A. D. 1898.

[SEAL.] WM. M. VAN DYKE, *Clerk.*

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63 At a stated term, to wit, the January term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Thursday, the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Olin Wellborn, district judge.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants, *vs.* THE CITY OF LOS ANGELES ET AL., Defendants. } No. 734.

This cause having heretofore been submitted to the court for its consideration and decision upon the demurrer of defendant The City of Los Angeles to complainants' bill of complaint, and the court having duly considered the same and being fully advised in the premises, it is now, on this 29th day of July, 1897, being a day in the January term, A. D. 1897, of said circuit court of the United States for the southern district of California, ordered that said demurrer be, and the same hereby is, overruled; to which ruling of the court defendants, by counsel, F. J. Thomas, Esq., duly note an exception. It is further ordered that defendants have three weeks from Monday, the 2nd of August, 1897, within which to answer complainants' bill of complaint.

64 I, Wm. M. Van Dyke, clerk of the circuit court of the United States for the southern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original order made and entered by said court July 29th, 1897, in the cause entitled Los Angeles City Water Company *et al.*, complainants, *vs.* The City of Los Angeles *et al.*, defendants, No. 734, and remaining of record therein.

Attest my hand and the seal of said circuit court this 20th day of June, A. D. 1898.

[SEAL.] WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 734. U. S. circuit court, ninth circuit, southern district of California. Los Angeles City Water Company *et al. vs.* The City of Los Angeles *et al.* Certified copy overruling demurrer of defendant The City of Los Angeles to bill of complaint. Filed Jun- 20, 1898. Wm. M. Van Dyke, clerk.

65 At a stated term, to wit, the January term, A. D. 1897, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Thursday, the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Olin Wellborn, district judge.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants,
vs.
THE CITY OF LOS ANGELES ET AL., Defendants. } No. 734.

This cause having heretofore been submitted to the court for its consideration and decision upon the demurrer of defendants Herman Silver *et al.*, composing the council of the city of Los Angeles, to complainants' bill of complaint, and the court having duly considered the same and being fully advised in the premises, it is now, on this 29th day of July, 1897, being a day in the January term, A. D. 1897, of said circuit court of the United States for the southern district of California, ordered that said demurrer be, and the same hereby is, overruled; to which ruling of the court defendants, by counsel, F. J. Thomas, Esq., duly note an exception. It is further ordered that defendants have three weeks from Monday, the 2nd of August, 1897, within which to answer complainants' bill of complaint.

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[SEAL.] WM. M. VAN DYKE, *Clerk.*

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67 In the Circuit Court of the United States, Ninth Circuit, for the Southern District of California.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants,
vs.
THE CITY OF LOS ANGELES ET AL., Defendants.

The answer of The City of Los Angeles, one of the defendants, to the bill of complaint of The Los Angeles City Water Company, Crystal Springs Land and Water Company, and S. G. Murphy, complainants.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' said bill of complaint contained, and of the exceptions heretofore taken by this defendant to said bill of complaint, and of the demurrer heretofore interposed by it to said bill of complaint, for answer thereto, or unto so much thereof and such part as this defendant is advised is or are material or necessary for it to make answer unto, this defendant, for answering, saith:

1. This defendant denies that on or about the 22nd day of July, 1868, or at any other time, this defendant or the mayor and common council of the city of Los Angeles, named in said bill of complaint, or any predecessor of this defendant, entered into the written contract, a copy whereof is set forth in paragraph IV of said bill of complaint, or any other contract whereby this defendant or said mayor and common council of the city of Los Angeles or any predecessor of this defendant agreed with J. S. Griffin, P. Beaudry, and
68 Solomon Lazard, named in said bill of complaint, or any one or more — them, that the water rates to be charged by said Griffin, Beaudry, and Lazard, or any one or more of them, or any other person, should not exceed a certain amount, or by which this defendant or said mayor and common council of the city of Los Angeles, or any predecessor of this defendant, agreed that the legislature of this State or this defendant or any predecessor of this defendant should not have the absolute and uncontrolled right to fix and establish water rates to be charged by said Griffin, Beaudry, and Lazard, or any one or more of them, or any other person or corporation for supplying water to said city or its inhabitants.

And this defendant alleges that at the time of the alleged execution of said pretended contract set forth in paragraph IV of said bill of complaint the laws of the State of California prohibited any municipal corporation from entering into any contract with any person or corporation whereby such municipal corporation or the legislature of this State might be deprived of the absolute and uncontrolled right and power to establish and fix water rates to be charged by any person or corporation supplying water to such municipal corporation or its inhabitants, and that said mayor and common council of the city of Los Angeles had no power or author-

ity to enter into said pretended contract set forth in paragraph IV of said bill of complaint, so far as it purports to restrict the uncontrolled and absolute right and power of said mayor and common council and its successors and the legislature of the State of California in fixing and establishing the water rates to be charged by said Griffin, Beaudry, and Lazard and their assigns for water to be supplied by them to the inhabitants of said city of Los Angeles.

2. This defendant admits that said pretended contract set forth in paragraph IV of said bill of complaint was assigned by said Griffin, Beaudry, and Lazard to the complainant Los Angeles City Water Company, and this defendant alleges that said assignment was made not later than the 12th day of June, 1869.

69 3. This defendant upon information and belief denies that the said Griffin, Beaudry, and Lazard and the complainant Los Angeles City Water Company or any one or more of them have performed all of the terms and conditions of said pretended contract set forth in said paragraph IV of said bill of complaint on their part to be performed; and this defendant alleg-s that said complainant, Los Angeles City Water Company, has, among other violations and breaches of said pretended contract, ever since the 20th day of October, 1896, without the consent of this defendant or of said mayor and common council of the city of Los Angeles and in violation of said pretended contract, continuously taken from the Los Angeles river, mentioned in said bill of complaint, for the use of the water works also mentioned in said bill more than the quantity of ten inches of water measured under a four-inch pressure, to wit, several hundred inches, measured under a four-inch pressure, and continuously appropriated and converted the same to the use and benefit of said complainant, Los Angeles City Water Company, and deprived this defendant of the same, to its great damage.

4. This defendant has no information upon the subject sufficient to enable it to answer the allegations of said bill of complaint in reference thereto, and it therefore denies that in order to perform the pretended contract mentioned in paragraph IV of said bill on the part of said Los Angeles City Water Company, or to extend the iron pipes provided for in said pretended contract as fast as the people of said Los Angeles city desired to be supplied with water for domestic purposes and would agree to take sufficient water to pay ten per cent. per annum interest upon the cost of extending said pipes through the streets which were at that time unsupplied with water, or to obtain a supply of water over and above the said ten inches mentioned in said pretended contract, or for any other purpose or purposes, the complainant Los

70 Angeles City Water Company has been compelled to spend a large amount of money, to wit, more than two millions of dollars, or any other sum of money in excess of seventy-five thousand dollars, in laying down pipes in the streets of said city to furnish the inhabitants thereof with water or to furnish water for the public schools, city hospitals, or jails, as in said pretended contract provided or otherwise, or that said complainant, Los Angeles City Water Company, has laid down over and above

the 12 miles of water pipe which they had purported in said pretended contract to agree to lay down about 300 miles of water pipe or any other quantity of water pipe in excess of ten miles, to be used or now used for the purpose of furnishing said city and its inhabitants with water in compliance with the terms and conditions of said pretended contract or for any other purpose or purposes or at all.

5. This defendant on information and belief denies that the points from which water was to be taken by said complainant, Los Angeles City Water Company, to supply the inhabitants of said city with water were at such elevations that it was impossible to take the water to those portions of said city which in the last 12 or 14 years *years* have grown up in the general prosperity of the city.

This defendant has no information upon the subject sufficient to enable it to answer the allegations of said bill in reference thereto, and it therefore denies that the complainant Los Angeles City Water Company has, at an immense or other outlay of money or otherwise, purchased the system that was established by Prudent Beaudry and known as the Beaudry system of water works or the system established by the East Side Springs Water Company, or has purchased or now owns or holds certain water rights in the Arroyo Seco mentioned in paragraph X of said bill of complaint, or is taking water from the said Arroyo Seco into said city on the eastern side of the Los Angeles river or elsewhere for the supply of
71 the inhabitants of that portion of the city or elsewhere, or that said systems of works and said water rights or any of them or any part thereof *is* now being used or operated by said Los Angeles City Water Company for the purpose of furnishing the city of Los Angeles and the inhabitants thereof with water under or in pursuance of said pretended contract mentioned in paragraph IV of said bill or for any other purpose or at all.

6. This defendant has no information upon the subject sufficient to enable it to answer the allegations of said bill of complaint in reference thereto, and it therefore denies that the complainant Los Angeles City Water Company purchased of Charles V. Howard, named in paragraph XIII of said bill, a portion of Los Felis rancho, known as Crystal Springs tract, or any part thereof, or any other land, or that said Charles V. Howard had, prior to the year 1869 or at any other time, acquired the title to said Los Felis rancho or any part thereof, embracing said Crystal Springs tract or any part thereof, under the patent from the United States or otherwise, or that subsequently or at any other time said Crystal Springs tract or any part thereof was conveyed by said Los Angeles City Water Company, or at all, to the Crystal Springs Land and Water Company, or that said Crystal Springs Land and Water Company acquired by purchase from the owners of the remainder of the Los Felis rancho and from the owners of portions of the San Rafael rancho, or at all, the right to enter upon the said lands, parts of the Los Felis and San Rafael ranchos, or any part thereof, to develop or collect together the waters percolating in the soil upon said ranchos or any part thereof within the tracts where the rights of development and col-

lection and diversion is alleged in said paragraph XIII to have been acquired or elsewhere, or that said Crystal Springs Land and Water Company did, at an enormous or other expense, or at all, make excavations or any excavation or lay pipes or any pipe within
72 the portions of the said Los Felis and San Rafael ranchos mentioned in said bill or elsewhere.

This defendant denies on information and belief that the complainant Crystal Springs Land and Water Company did develop of the percolating waters in the soil mentioned in paragraph XIII of said bill of complaint about 700 inches of water under a four-inch pressure, or any other amount of water, or that said waters alleged in said paragraph to have been developed by said Crystal Springs Land and Water Company, or any part thereof, was conducted by said Crystal Springs Land and Water Company, under or by virtue of the pretended rights alleged in said paragraph to have been acquired from the owners of said lands, or otherwise, to a point to connect the conduits with the system of water works owned by the complainant Los Angeles City Water Company, or elsewhere, or that said Crystal Springs Land and Water Company, by the grants from the owners of the portions of said Ranchos Los Felis and San Rafael, where said developments are alleged in said paragraph XIII to have been made or otherwise, became vested with the right to make such excavations or excavation or any other excavation, or to own, take, divert, or use the waters which said Crystal Springs Land and Water Company might by the alleged works mentioned in said paragraph develop, or by said pipes or any pipe or pipes divert.

This defendant upon information and belief denies that the complainant Crystal Springs Land and Water Company did acquire the waters mentioned in said paragraph XIII or any part thereof, or the right to the use or disposition thereof, or did lease to the complainant Los Angeles City Water Company the said 700 inches of water mentioned in said paragraph or any part thereof, or the right to take the same through the system of works alleged in said paragraph to be owned by said complainant, Los Angeles City Water Company, or through any other system, or to conduct the same or any part thereof into said Los Angeles city to supply said
73 city or the inhabitants thereof with water for domestic purposes or for any other purpose or at all.

This defendant admits that on the 13th day of December, 1886, the complainant Los Angeles City Water Company made a pretended deed of conveyance to said complainant, Crystal Springs Land and Water Company, whereby said Los Angeles City Water Company did purport to convey, without consideration, certain pretended water rights, lands, and water works; and also that on the 30th day of December, 1886, said complainant, Crystal Springs Land and Water Company, made a pretended lease to the complainant Los Angeles City Water Company, purporting to lease to said Los Angeles City Water Company all of the property so purported to have been conveyed to said Crystal Springs Land and Water Company by said last-mentioned deed of conveyance, as aforesaid, upon

the terms that said Los Angeles City Water Company would pay to said Crystal Springs Land and Water Company monthly 40 per cent. of the gross earnings and receipts realized by said Los Angeles City Water Company from the sale of water during the term of said pretended lease, to wit, eleven years from January 1st, 1887; but this defendant alleges upon information and belief that said Crystral Springs Land and Water Company was organized and incorporated in the month of November, 1886, by all of the then stockholders of the complainant Los Angeles City Water Company, and that all of the capital stock of said Crystal Springs Land and Water Company was, upon its incorporation, subscribed and taken by said stockholders of said Los Angeles City Water Company in the same proportion in which said stockholders then held the capital stock of said Los Angeles City Water Company, and that the capital stock of said Crystal Springs Land and Water Company has ever since been held by all of the stockholders of said Los Angeles City Water Company in the same proportions in which they have held the capital stock of said Los Angeles City Water Company, and that at the time of the execution of said last-mentioned pretended deed of conveyance and at the time of the execution of said last-mentioned pretended
74 lease all of the stockholders of said Los Angeles City Water Company were and composed all of the stockholders of said Crystal Springs Land and Water Company, and said stockholders of said Los Angeles City Water Company then held and owned all of the stock of said Crystal Springs Land and Water Company in the same proportions in which they then held and owned the capital stock of said Los Angeles City Water Company, and that both of said companies were at the time of the incorporation of said Crystal Springs Land and Water Company and ever since have been practically one company and controlled by the same stockholders and officers, and that the pretended incorporation of said Crystal Springs Land and Water Company was simulated and not effected in good faith and was procured by the stockholders of said Los Angeles City Water Company for the purpose of making it the apparent owner of all of the property and rights of said Los Angeles City Water Company outside of the said city of Los Angeles, and in order to pretend that said Los Angeles City Water Company was incurring an expense for the rental of the water and other property used by it in supplying water to the city of Los Angeles and its inhabitants; and this defendant alleges on information and belief that in truth and fact said Los Angeles City Water Company never paid and has never been under any obligation to pay to any person or corporation other than this defendant any rental for the use of any water furnished to the city of Los Angeles or its inhabitants, but all of the pretended rental mentioned in said pretended lease has always been divided among all of the stockholders of said complainant, Los Angeles City Water Company, in proportion to the amount of capital stock in said company held by them respectively.

7. This defendant denies that at the time mentioned in paragraph XIV of said bill of complaint or at any other time the acquisition

of a further water supply was necessary to enable the com-
75 plainant Los Angeles City Water Company to perform the pretended contract mentioned in said paragraph, or to supply the inhabitants of the city of Los Angeles with water; but, on the contrary, this defendant alleges that it was always ready, able, and willing to furnish a full and adequate supply of water for all of the purposes needed by said complain-t, and especially sufficient water from the Los Angeles river, mentioned in the pretended contract, set forth in paragraph IV of said bill, to supply said city and its inhabitants with water for domestic use and all other purposes, for a reasonable charge and price, not exceeding that which said Los Angeles City Water Company pretended to contract to pay said Crystal Springs Land and Water Company in and by said simulated lease mentioned in paragraph VIII of said bill.

8. That this defendant has no information upon the subject sufficient to enable it to answer the allegations of the bill of complaint in reference thereto, and it therefore denies, that in the acquisition of the alleged water rights mentioned in paragraph XV of said bill, or in the alleged development or collection of the alleged percolating water mentioned in said paragraph, or in the construction of the pipes to carry said waters, or in the purchase or laying of the water pipes throughout the city of Los Angeles, mentioned in said paragraph, for the purpose of supplying said city with water, as in said alleged contract provided, or for any other purpose, or at all, the Crystal Springs Land and Water Company expended a large or other amount of money, or about three millions of dollars, or any other sum whatever, or that said Los Angeles City Water Company expended for all or any of said purposes, or any other purpose, or at all, a large or other amount of money, or three millions of dollars, or any other sum whatever, exceeding the sum of seventy-five thousand dollars; and this defendant alleges upon information and belief that all of the moneys, if any, which have been expended by the complainant-Los Angeles City Water Company and Crystal Springs Land and Water Company, or either of them, in or about any of the property and water works mentioned in said bill of complaint, or in or about
76 any water works, including water rights and waters and other property used for the purpose of supplying water to said city of Los Angeles and its inhabitants, have been fully paid out of the water rates derived by said Los Angeles City Water Company from the sale of water to the inhabitants of said city, and, in addition thereto, the stockholders of said Los Angeles City Water Company have received and divided among themselves from water rates derived from the sales of water to the inhabitants of said city immense sums of money, aggregating several millions of dollars, and that the income which will be received by said stockholders from the water rates collected by said Los Angeles City Water Company for supplying water to the inhabitants of said city, according to the rates fixed by the ordinance sought to be set aside in this suit, will be far in excess of the income derived from ordinary investments or from loans on mortgage security of an amount of money equal to the value of all property used by said Los Angeles City Water

Company in supplying water to said city of Los Angeles and its inhabitants.

9. This defendant alleges that it has no information upon the subject sufficient to enable it to answer the allegations of said bill in reference thereto, and it therefore denies that the complainants Los Angeles City Water Company and Crystal Springs Land and Water Company, or either of them, has contracted a bonded indebtedness of $409,000 or any other sum, or that to secure the payment of said indebtedness or any other indebtedness said companies or either of them did convey to the complainant S. G. Murphy the alleged properties and water rights mentioned in paragraph XVI of said bill, or any part thereof, to secure the payment of said alleged indebtedness or any other indebtedness to the holders of said alleged bonds, or otherwise, or that said S. G. Murphy still holds the said property or any part thereof under said alleged deed of trust to secure said alleged bonded indebtedness or
77 any other indebtedness mentioned in said paragraph, or any part thereof, or that said bonded indebtedness of said companies or of either of them, or any part thereof, is still outstanding or unpaid on said alleged deed of trust.

This defendant denies that in and by said pretended lease mentioned in paragraph XVI of said bill only twenty-five per cent. of the gross receipts from water rates *were* purported to be agreed to be paid to said Crystal Springs Land and Water Company, but alleges that forty per cent. of said gross receipts was in said pretended lease purported to be agreed to be paid by said Los Angeles City Water Company to said Crystal Springs Land and Water Company as rental for the use of the property pretended to be leased by said pretended lease.

This defendant denies that the complainant Los Angeles City Water Company has acquired the pretended contract rights mentioned in said paragraph XVI or since the 1st day of January, 1880, has been furnishing to said city for municipal and public uses ementioned in said paragraph or for any other municipal use or purpose the water alleged in said paragraph to have been furnished by said complainant to said city in pursuance of the alleged contract set forth in paragraph IV of said bill; but, on the contrary, this defendant alleges that this defendant has taken the said water so used by it for municipal purposes, mentioned in said paragraph, as water belonging to it and coming from said Los Angeles river; and this defendant alleges that said complainant, Los Angeles City Water Company, in the latter part of August, 1878, endeavored to force this defendant to pay for water taken by it from the hydrants erected by said company and used for sprinkling the streets of said city, but this defendant refused to pay the same on the ground that said water belonged to this defendant as part of the Los Angeles river, and that by the judgment of the district court in and for said county of Los Angeles and by the judgment of the supreme court of said State it was determined that said waters belonged to this defendant as part of the Los Angeles river, and that this defendant, as owner thereof, had
78 good right to take the same from the pipes of the complainant Los Angeles City Water Company for all municipal purposes,

and for this and no other reason the said complainant, Los Angeles City Water Company, has acquiesced in this defendant taking water from the pipes of said complainant for municipal purposes of said city; and this defendant further alleges that for several years past *past* the complainant Los Angeles City Water Company has been supplying water to the inhabitants of said city and to this defendant through water systems erected by various persons and corporations under licenses from this defendant, providing expressly that this defendant should have the uncontrolled and absolute right and power to regulate the water rates to be charged for water supplied to the inhabitants of said city through their said systems, and also that water should be furnished to this defendant from said systems for all municipal purposes free of charge; and this defendant denies that said complainant, Los Angeles City Water Company, has performed or is still performing all of the terms and conditions of the said pretended contract on its part to be performed.

10. This defendant denies that in the year 1870, or at any other time, commissioners or any commissioner was appointed by said city for the purpose of ascertaining or determining the amount of rates that were charged for furnishing water to the inhabitants of said city at the date of said pretended contract mentioned in paragraph IV of said bill, or any of said rates, or that after investigation or examination or otherwise said commissioners or committee or any of them reported, or said council accepted, the rates set forth in paragraph XVII of said bill or any of them as being the rates charged at the date of said pretended contract, or that said rates, alleged in said paragraph to have been ascertained and determined by said commissioners or any of them, were accepted by said city,
79 or that it was agreed between said city and said Los Angeles City Water Company that said rates or any other rates or any of them should be accepted as the minimum rates to be charged by said Los Angeles City Water Company under said pretended contract.

11. This defendant denies that the pretended contract mentioned in paragraph IV of said bill of complaint was ratified by the act of the legislature mentioned in paragraph XVIII of said bill or by any other act of the legislature, or at all.

This defendant alleges that the pretended act of the legislature mentioned in said paragraph XVIII, purporting to declare that the following acts and contracts and ordinances of the mayor and common council of the said city of Los Angeles were thereby ratified and confirmed, to wit, the contract and lease for the care and maintenance of the Los Angeles city water works, entered into and made between the mayor and common council of the city of Los Angeles, on the one part, and John S. Griffin, Prudent Beaudry, and Solomon Lazard on the other part, dated the 20th day of July, 1868, and also the ordinance confirmatory of the same, passed July 22nd, 1868, which contract and ordinance were recorded in the office of the county recorder of Los Angeles county, in Book 1 of Miscellaneous Records, at pages 428–431, and also two certain concessions from said corporation to William G. Dryden, his heirs and assigns,

concerning rights of way and water, and the ordinance authorizing the same, passed February 24th, 1857, and December 8th, 1857, respectively, and recorded in the aforesaid recorder's office, in Book 2 of Deeds, pages 453 and 449, respectively, and a certain conveyance to Hiram McLaughlin, his heirs and assigns, from said corporation, dated August 6th, 1858, and recorded in Book 4 of Deeds, pages 225–'6, and that said pretended act of the legislature did not purport to enact any other thing or matter whatsoever.

This defendant alleges that at the date of the passage and approval of said pretended act of the legislature and at the time the same was to take effect by its terms the said John S. Griffin,
80 Prudent Beaudry, and Solomon Lazard had not nor had any one of them any right, title, interest, or estate of, in, or to any of the property, rights, or privileges purported to be given, conceded, or conveyed or agreed to be given, conceded, or conveyed to said Griffin, Beaudry, and Lazard in and by said pretended contract set forth in paragraph IV of said bill; but, on the contrary, all of their right, title, interest, and estate of, in, and to all of the property, rights, and privileges purported to be given, conceded, or conveyed to them in and by said pretended contract had been previously, to wit, not later than the 12th day of June, 1869, conveyed by them to the complainant Los Angeles City Water Company and ever since that date up to the present time have been owned by said Los Angeles City Water Company.

This defendant alleges that at the time of the passage and approval of said pretended act of the legislature it was expressly provided by the constitution of the State of California that the legislature of said State should have no authority to create private corporations, but that the same should be formed under general laws which might be altered from time to time or repealed, and that it was the rule of decision of the supreme court of the State of California at the time of the passage and approval of said pretended act and ever since that any act of the legislature which had the effect of granting a special franchise to any private corporation was in violation of and contrary to said constitutional provision and was null and void; and this defendant alleges that said pretended act of the legislature, in so far as it purported to ratify or confirm the provisions of said pretended contract set forth in paragraph IV of said bill, purporting to prohibit the mayor and common council of the city of Los Angeles and its successors and the legislature of said State from establishing water rates to be charged by said Griffin, Beaudry, and Lazard and their assigns for water to be furnished to the inhabitants of said city of Los Angeles for domestic
81 purposes under said pretended contract below those then charged by said Griffin, Beaudry, and Lazard, was repugnant to and in violation of said constitutional provision and was null and void and of no effect.

And this defendant further alleges upon information and belief that it was the intention of the said Griffin, Beaudry, and Lazard, at the time of entering into said pretended contract set forth in said paragraph IV of said bill, to organize themselves and certain asso-

ciates who were then and there interested with them in procuring said contract into a private corporation under an act of the legislature of the State of California entitled "An act for the incorporation of water companies," approved April 22nd, 1858, and said Griffin, Beaudry, and Lazard and their said associates did shortly afterwards, on the 18th day of August, 1868, prepare, sign, and file with the county clerk of Los Angeles county, State aforesaid, a certificate of incorporation under said last-mentioned act of the legislature for the formation and incorporation of the complainant Los Angeles City Water Company, and that in and by said certificate of incorporation it was stated that the objects for which said corporation was formed were to supply the inhabitants of said city of Los Angeles with water for domestic purposes and to conduct the same into and distribute the same through the streets and alleys of said city by means of pipes, tubes, hydrants, flumes, ditches, wheels, reservoirs, pumps, and other machinery, said water to be taken from said Los Angeles river or the zanjas or branches thereof, or springs forming the same, or from such other source of supply as said corporation might find convenient and economical, and to make certain improvements, and to sell and distribute water to the inhabitants of said city for domestic purposes under the terms of said pretended contract, set forth in paragraph IV of said bill.

That thereafter, on the 26th day of August, 1868, said Los Angeles City Water Company was duly formed and incorporated under said certificate of incorporation and under said last-mentioned act of the legislature as a water company, and that the incorpora-
82 tors thereof were said Griffin, Beaudry, and Lazard and their said associates.

That, as this defendant is informed and believes, said pretended contract was procured by said Griffin, Beaudry, and Lazard and their said associates in trust for said water company, and to convey said pretended contract to said company as soon as it should be incorporated, and, in truth and fact, all of the conditions and covenants of said pretended contract contained on the part of said Griffin, Beaudry, and Lazard, which were in fact performed, were so performed by said Los Angeles City Water Company, and not by said Griffin, Beaudry, and Lazard, and said Griffin, Beaudry, and Lazard did not, nor did any of them, ever comply with any of the terms or conditions of said pretended contract, or do anything thereunder, but ever since the alleged execution of said pretended contract the complainant Los Angeles City Water Company has been in the sole and exclusive possession, management, and control of the water works purported in said pretended contract to be leased, and all of the rights, privileges, and property acquired by said Griffin, Beaudry, and Lazard under or by virtue of said pretended contract.

That in and by said statute approved April 22nd, 1858, it was provided that water rates to be collected by any corporation formed thereunder should be reasonable and should be determined by a board of commissioners, of whom two were to be selected by the city authorities of the city wherein such corporation furnished water

and two by the water company, and in case the four could not agree to the valuation, then all four of said commissioners were to choose a fifth person, and if they could not agree, such fifth commissioner was to be appointed by the sheriff of the county wherein such city was situated, and said commissioners so to be selected or appointed should determine the rates to be charged by said company for one year or until new rates should be established.

83 That at the time of the alleged execution of said pretended contract set forth in paragraph IV of said bill it was provided by an act of the legislature of the State of California, then in force, entitled "An act to provide for the incorporation of water companies," passed May 3rd, 1852, that no contract between any city of said State and any company organized to supply such city with water should take from such city the absolute and uncontrolled right to regulate the rates for water supplied to the inhabitants of such city.

That said Griffin, Beaudry, and Lazard and their said associates delayed making a formal conveyance to said complainant, Los Angeles City Water Company, until the 12th day of July, 1869, but, as hereinbefore alleged, said company acted as the owner of all of the rights, privileges, and property acquired by said Griffin, Beaudry, and Lazard under and by virtue of said pretended contract, and of all of the water works and other property used for the supplying of water to said city, from the time of the incorporation of said company up to said formal conveyance, in the same manner as it did subsequently to the execution of said conveyance.

This defendant has no information or belief upon the subject sufficient to enable it to answer the allegations of said bill in reference thereto, and it therefore denies that the rates set forth in paragraph XVII of said bill or any of them were agreed upon by the parties to said pretended contract as the rates charged at the time said pretended contract was made, or were the rates that were charged at the time of the execution of said pretended contract.

12. This defendant denies that this defendant has ever since the making of said pretended contract set forth in paragraph IV of said bill of complaint or at any other time recognized the existence of said pretended contract, or that said defendant has in every year or at any other time demanded of said complainant, Los Angeles City Water Company, the performance of the various terms

84 and conditions of said pretended contract on its part or any of them.

This defendant admits that the council of said city has from time to time requested said complainant to do various things agreed in said pretended contract by said Griffin, Beaudry, and Lazard to be done by them and their assigns, but denies that such request has been made in recognition of the validity of said pretended contract, but, on the contrary, alleges that said complainant, Los Angeles City Water Company, ever since its said incorporation, has been in possession of the water works of this defendant mentioned in said pretended contract and has been making use of the streets and public ways of said city and the lands of said defendant for the

purpose of constructing reservoirs and other works and laying pipes for the supplying of water to the inhabitants of said city, and has during all that time used large quantities of waters of said Los Angeles river, the property of said defendant, for that purpose, and said defendant has merely acquiesced in said complainant, Los Angeles City Water Company, supplying water to the inhabitants of said city during said period as being a tenant at will of said defendant, which tenancy was torminable at any time at the option of said defendant, and up to the 20th day of October, 1896, consented to the taking of the waters of said river by said complainant, and the benefits, advantages, and emoluments gained and received by said complainant, without taking into consideration the waters of said river so used by said complainant, as aforesaid, during the whole of said period up to the present time, have afforded an immense and generous and more than reasonable remuneration and compensation to said complainant and its stockholders for all the services which it has performed in doing the acts mentioned in paragraph XIX of said bill, and that the income derived by said complainant and its stockholders from the water rates received by it during said period for supplying the inhabitants of said city with water has
85 always been far in excess of the reasonable interest upon the investment of said complainant in all of the property used by it in so supplying water to said inhabitants.

This defendant denies that said complainant, Los Angeles City Water Company, during all of the time mentioned in said paragraph XIX or during or at any other time, furnished water for sprinkling the streets of said city and for all the public uses and purposes mentioned in said paragraph, or any of them, in accordance with said pretended contract and not otherwise, or that this defendant has been accepting said waters alleged in said paragraph to have been provided and furnished by said Los Angeles City Water Company for said purposes, as furnished or provided under said contract; but, on the contrary, this defendant alleges that this defendant has, during all of said time, taken all of the water furnished or provided to it by said Los Angeles City Water Company free of charge, as water belonging to said defendant, and taken from said Los Angeles river, and which the Los Angeles City Water Company had no right to sell or dispose of to others, as determined by the decision of the supreme court of the State of California hereinbefore referred to.

This defendant alleges that said complainant, Los Angeles City Water Company, ever since its incorporation, has continuously taken the water from said Los Angeles river, belonging to this defendant, varying in quantity from a few inches, measured under a four-inch pressure in the beginning, and gradually increasing in amount until the same amounted to several hundred inches, measured under a four-inch pressure, and that shortly before the 20th day of October, 1896, said defendant notified said complainant not to take any more water from said river in excess of the ten inches mentioned in said pretended contract; but, notwithstanding said notice, and without the consent, previous or otherwise, of said de-

fendant, said complainant, Los Angeles City Water Company, has ever since said last-mentioned date continuously taken from
86 said Los Angeles river a large quantity of water thereof belonging to said defendant, amounting to several hundred inches, measured under a four-inch pressure, in utter disregard and willful violation of the provisions of said pretended contract, wherein said Griffen, Beaudry, and Lazard did, for themselves and assigns, purport to covenant not to take any water from said river in excess of ten inches without the previous consent of the predecessor of said defendant, the mayor and common council of the city of Los Angeles.

This defendant denies that it or any of its predecessors, or said mayor and common council of the city of Los Angeles, ever recognized any contract obligation of said Los Angeles City Water Company to do or perform all thi things purported to be agreed to be performed by said Griffen, Beaudry, and Lazard and their associates, or any of said things under said pretended contract, or has recognized or insisted upon the right of said city of Los Angeles to receive the benefits of said pretended contract or all or any of the benefits provided for in said pretended contract; but this defendant alleges that all of the things which this defendant has ever required of said Los Angeles City Water Company were demanded by said defendant as from a tenant at will who was obligated to do anything which said defendant might require, or in default thereof to abstain from using any of the property of said defendant or exercising any franchise in said city.

13. This defendant denies that under or by virtue of said pretended contract set forth in paragraph IV of said bill said complainant, Los Angeles City Water Company, is obligated to lay pipes or supply water to the inhabitants living in any territory which was not at the date of said pretended contract included within the territorial limits of said municipal corporation, known at that time as the mayor and common council of the city of Los An eles, and this defendant alleges that the territory then included in said territorial limits is only a small portion of the present territory included within the present limits of said city.

87 14. This defendant alleges upon information and belief that said pretended contract was procured by said Griffen, Beaudry, and Lazard for the benefit and use of said complainant, Los Angeles City Water Company, and that at the time of the incorporation of said complainant and at the time of the formal assignment of said pretended contract to it, as hereinbefore alleged, the laws of the State of California expressly provided that it should be competent to amend or modify in any respect whatever or utterly repeal the charter and all laws under which said complainant was incorporated, and that the law-making power of said State, ever since the incorporation of said complainant, had full authority to enact the provisions of the constitution of said State set forth in paragraph XXI of said bill, and to enact the statute set forth in paragraph XXII of said bill, and also to enact the provisions of the charter of this defendant set forth in paragraph XXIII of said bill, and that

all of said constitutional provisions, statutes, and charter have ever since their enactment respectively applied to and bound in every respect said complainant and the other complainants herein.

15. This defendant denies that said provisions of the constitution of the State of California set forth in paragraph XXI of said bill of complaint or any of them impair the alleged obligation of said pretended contract set forth in paragraph IV of said bill or any contract with said Los Angeles City Water Company, or are in violation of the provisions of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of any contracts, or any other provision of the Constitution of the United States, or that said provisions of said constitution or the acts of the legislature mentioned in paragraph XXV of said bill are, or any one of them is, in violation of the said provision of the Constitution of the United States or in violation of amendment XIV to the Constitution of the United States, prohibiting any State from
88 depriving any person of life, liberty, or property without due process of law and prohibiting the said State from denying to any person within their jurisdiction equal protection of the laws, or of any other provision of the Constitution of the United States.

This defendant denies that the attempt in the constitution of the State of California and the acts of the legislature mentioned in paragraph XXV of said bill to create a condition in the estate of said Los Angeles City Water Company in its alleged property mentioned in said paragraph, whereby said title is to be defeated, is an attempt to deprive said Los Angeles City Water Company of its property without due process of law.

16. This defendant denies upon information and belief that under the provisions of the ordinance set forth in paragraph XXVI of said bill, at the rates therein fixed, the revenues of said Los Angles City Water Company would be reduced more than forty per cent. or any per cent. or at all below an amount which it would receive at the rates alleged in said paragraph to have been charged in 1868 for the same services; but, on the contrary, this defendant alleges upon information and belief that said company would not have charged any higher rates than those fixed in said ordinance had not the same been enacted, as said last-mentioned rates were more than a full, fair, and reasonable compensation for the services performed, and said complainant, Los Angeles City Water Company, would not have charged higher rates for fear of inviting other persons and corporations into competition with them in supplying water to the inhabitants of said city.

This defendant alleges that in truth and fact said complainant voluntarily and prior to the year 1880 reduced rates for water supplied by it to the inhabitants of said city of Los Angeles far below those set forth in paragraph XVII of said *bi* bill, and that ever since and including the year 1880 up to and including the year 1895 the council of said city has yearly, and with the acquiescence and consent of said complainant, Los Angeles City Water Company, and acting in pursuance of the constitutional pro-
89 visions, statutes, and charter set forth in paragraphs XXI, XXII, and XXIII of said bill established and fixed the

water rates to be charged by said complainant for water furnished to the inhabitants of said city of Los Angeles far below those set forth in said paragraph XVII of said bill, and that in truth and fact said provisions of said pretended contract purporting to prohibit said mayor and council from reducing the water rates to be charged by said Griffen, Beaudry, and Lazard under said pretended contract were in consideration of many advantages and benefits received from this defendant and its predecessor by said Los Angeles City Water Company, waived and abandoned by said Los Angeles City Water Company many years prior to the passage of said ordinance set forth in paragraph XXVI of said bill, and said provisions of said pretended contract have never been observed or carried into effect or recognized by this defendant or said Los Angeles City Water Company since the year 1879.

And this defendant on information and belief denies that under the provisions of said last-mentioned ordinance the ability of said Los Angeles City Water Company to make the necessary extensions and construct the necessary improvements to meet the wants and keep up with the progress of said Los Angeles city will be greatly or at all impaired, or that the amount of the rent which said Crystal Springs Land and Water Company would receive will be forty per cent. less than it is entitled to receive, or that the ability of said Los Angeles City Water Company to pay its interest upon outstanding bonds, or to maintain the operating expenses or repairs or improvements necessary for the proper administration of any system, or to comply with said pretended contract set forth in paragraph IV of said bill will be greatly or at all impaired, or that said Los Angeles City Water Company or said Crystal Springs Land and Water Company will be deprived of any revenues which it ought to receive, or will be unable in any respect to carry on its business or any business or to properly perform said pretended con-
90 tract; but, on the contrary, this defendant alleges on information and belief that said Los Angeles City Water Company would not and could not have collected any greater rates for water supplied by it to the inhabitants of said city of Los Angeles than those set forth in said ordinance mentioned in paragraph XXVI of said bill had said ordinance not been passed.

17. This defendant denies that if said Los Angeles City Water Company should attempt to take more than the rates fixed in said last-mentioned ordinance this defendant would claim that the property of said Los Angeles City Water Company was forfeited to said defendant or would attempt to enforce such forfeiture.

This defendant denies that the complainants or any of them cannot maintain all rights which they might possess under the several pretended contracts set forth in said bill except at the peril of the loss of their property mentioned in paragraph XVII of said bill, or any other property, or at the peril of the certainty of their being greatly or otherwise interfered with by said city of Los Angeles in their attempts to maintain or operate said property.

18. This defendant denies upon information and belief that the matter in dispute in this suit exceeds, exclusive of interest and

costs, or otherwise, the sum or value of $150,000 or any other sum or value, but, on the contrary, this defendant alleges upon information and belief that said complainants do not in good faith contest said ordinance set forth in paragraph XXVI of said bill, and do not in good faith contend that the rates therein fixed are not reasonable and fair, or that said rates are below those which would have been charged by said Los Angeles City Water Company of its own motion, and that the sole and only object of complainants in bringing this suit is to endeavor to have the question of the title to the alleged percolating waters mentioned in said bill tried in this court, under the guise and pretense that said complainants are endeavoring to contest said last-mentioned ordinance and in order to
91 attempt to confer jurisdiction on this court by raising questions in regard to the invalidity of said last-mentioned ordinance as being repugnant to the Constitution of the United States.

Wherefore this defendant, having shown to this court by this answer that it has no jurisdiction of this cause, prays that said bill of complaint be dismissed for want of such jurisdiction, and having thus made answer fully to said bill, this defendant prays to be hence dismissed with costs.

W. E. DUNN,
City Attorney.
LEE & SCOTT,
Solicitors for said Defendant.

STATE OF CALIFORNIA,
County of Los Angeles, } ss:

W. E. Dunn, being duly sworn, says that he is the city attorney of the defendant City of Los Angeles, named in the foregoing answer; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

W. E. DUNN.

Subscribed and sworn to before me this 7 day of Sept., A. D. 1897.

[SEAL.] ROBERT A. TODD,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) No. 734. U. S. circuit court, so. dist. of California. Los Angeles City Water Co. *et al.*, compl'ts, *vs.* City of Los Angeles *et al.*, def'ts. Answer of City of Los Angeles. Received copy of within answer this 7th day of Sept'r, 1897. White & Monroe and J. S. Chapman, sol'rs for complainants. Filed Sep. 7, 1897. Wm. M. Van Dyke, clerk. W. E. Dunn & Lee & Scott, rooms 411–414, Bullard block, Los Angeles, California, sol'rs for def't.

92 In the Circuit Court of the United States, Ninth Circuit, for the Southern District of California.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants,
vs.
THE CITY OF LOS ANGELES ET AL., Defendants.

The answer of Hermann Silver, Z. D. Matthus, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, composing the council of the city of Los Angeles, nine of the defendants, to the bill of complaint of The Los Angeles City Water Company, Crystal Springs Land and Water Company, and S. G. Murphy, complainants.

These defendants, now and at all times hereafter, saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' said bill of complaint contained, and of the exceptions heretofore taken by these defendants to said bill of complaint, and of the demurrer heretofore interposed by them to said bill of complaint, for answer thereto or unto so much thereof and such parts as these defendants are advised is or are material or necessary for them to make answer unto, these defendants, for answering, say:

1. These defendants deny that on or about the 22nd day of July, 1868, or at any other time the defendant The City of Los Angeles or the mayor and common council of the city of Los Angeles, named in said bill of complaint, or any predecessor of the defendant The City of Los Angeles entered into the written contract, a copy whereof is set forth in paragraph IV of said bill of complaint, or any other contract whereby the defendant The City of Los Angeles or said mayor and common council of the city of Los Angeles or any predecessor of the defendant The City of Los Angeles

93 agreed with J. S. Griffin, P. Beaudry, and Solomon Lazard, named in said bill of complaint, or any one or more — them, that the water rates to be charged by said Griffin, Beaudry, and Lazard, or any one or more of them, or any other person, should not exceed a certain amount, or by which the defendant The City of Los Angeles or said mayor and common council of the city of Los Angeles or any predecessor of the defendant The City of Los Angeles agreed that the legislature of this State or the defendant City of Los Angeles or any predecessor of the defendant City of Los Angeles should not have the absolute and uncontrolled right to fix and establish water rates to be charged by said Griffin, Beaudry, and Lazard, or any one or more of them, or any other person or corporation, for supplying water to said city or its inhabitants.

And these defendants allege that at the time of the alleged execution of said pretended contract set forth in paragraph IV of said bill of complaint the laws of the State of California prohibited any municipal corporation from entering into any contract with any person or corporation, whereby such municipal corporation or the

legislature of this State might be deprived of the absolute and uncontrolled right and power to establish and fix water rates to be charged by any person or corporation supplying water to such municipal corporation or its inhabitants, and that said mayor and common council of the city of Los Angeles had no power or authority to enter into said pretended contract set forth in paragraph IV of said bill of complaint, so far as it purports to restrict the uncontrolled and absolute right and power of said mayor and common council and its successors and the legislature of the State of California in fixing and establishing the water rates to be charged by said Griffin, Beaudry, and Lazard, and their assigns for water to be supplied by them to the inhabitants of said city of Los Angeles.

94 2. These defendants admit that said pretended contract set forth in paragraph IV of said bill of complaint was assigned by said Griffin, Beaudry, and Lazard to the complainant Los Angeles City Water Company, and these defendants allege that said assignment was made not later than the 12th day of June, 1869.

3. These defendants upon information and belief deny that the said Griffin, Beaudry, and Lazard and the complainant Los Angeles City Water Company, or any one or more of them, have performed all of the terms and conditions of said pretended contract set forth in said paragraph IV of said bill of complaint on their part to be performed, and these defendants allege that said complainant, Los Angeles City Water Company has, among other violations and breaches of said pretended contract, ever since the 20th day of October, 1896, without the consent of the defendant City of Los Angeles or of said mayor and common council of the city of Los Angeles, and in violation of said pretended contract, continuously taken from the Los Angeles river mentioned in said bill of complaint, for the use of the water works also mentioned in said bill, more than the quantity of ten inches of water measured under a four-inch pressure, to wit, several hundred inches, measured under a four-inch pressure, and continuously appropriated and converted the same to the use and benefit of said complainant, Los Angeles City Water Company, and deprived the defendant City of Los Angeles of the same, to its great damage.

4. These defendants have no information upon the subject sufficient to enable them to answer the allegations of said bill of complaint in reference thereto, and they therefore deny that in order to perform the pretended contract mentioned in paragraph IV of said bill on the part of said Los Angeles City Water Company, or to extend the iron pipes provided for in said pretended contract as fast as the people of said Los Angeles city desired to be supplied with water for domestic purposes and would agree to take sufficient water to pay ten per cent. per annum interest upon the cost of ex-

95 tending said pipes through the streets which were at that time unsupplied with water, or to obtain a supply of water over and above the said ten inches mentioned in said pretended contract, or for any other purpose or purposes, the complainant Los Angeles City Water Company has been compelled to spend a large

amount of money, to wit, more than two millions of dollars or any other sum of money in excess of seventy-five thousand dollars, in laying down pipes in the streets of said city to furnish the inhabitants thereof with water, or to furnish water for the public schools, city hospitals, or jails, as in said pretended contract provided, or otherwise, or that said complainant, Los Angeles City Water Company, has laid down over and above the 12 miles of water pipe which they had purported in said pretended contract to agree to lay down about 300 miles of water pipe or any other quantity of water pipe in excess of ten miles, to be used or now used for the purpose of furnishing said city and its inhabitants with water in compliance with the terms and conditions of said pretended contract or for any other purpose or purposes or at all.

5. These defendants on information and belief deny that the points from which water *eas* to be taken by said complainant, Los Angeles City Water Company, to supply the inhabitants of said city with water were at such elevations that it was impossible to take the water to those portions of said city, which in the last 12 or 14 years *years* have grown *yp* in the general prosperity of the city. These defendants have no information upon the subject sufficient to enable them to answer the allegations of said bill in reference thereto, and they therefore deny that the complainant Los Angeles City Water Company has, at an immense or other outlay of money or otherwise, purchased the system that was established by Prudent Beaudry, and known as the Beaudry system of water works, or the system established by the East Side Springs Water Company, or has purchased or now owns or holds certain water rights in the Arroyo Seco, mentioned in paragraph X of said bill of complaint, or is taking water from the said Arroyo Seco into said city
96 on the eastern side of the Los Angeles river or elsewhere for the supply of the inhabitants of that portion of the city or elsewhere, or that said systems of works and said water rights or any of them or any part thereof *is* now being used or operated by said Los Angeles City Water Company for the purpose of furnishing the city of Los Angeles and the inhabitants thereof with water under or in pursuance of said pretended contract mentioned in paragraph IV of said bill or for any other purpose or at all.

6. These defendants have no information upon the subject sufficient to enable them to answer the allegations of said bill of complaint in reference thereto, and they therefore deny that the complainant Los Angeles City Water Company purchased of Charles V. Howard, named in paragraph XIII of said bill, a portion of Los Felis rancho, known as Crystal Springs tract, or any part thereof, or any other land, or that said Charles V. Howard had prior to the year 1869 or at any other time acquired the title to said Los Felis rancho, or any part thereof, embracing said Crystal Springs tract, or any part thereof, under the patent from the United States or otherwise, or that subsequently or at any other time said Crystal Springs tract, or any part thereof, was conveyed by said Los Angeles City Water Company or at all to the Crystal Springs Land and Water Company, or that said Crystal Springs Land and Water Company

acquired by purchase from the owners of the remainder of the Los Felis rancho and from the owners of portions of the San Rafael rancho or at all the right to enter upon the said lands parts of the Los Felis and San Rafael ranchos, or any part thereof, to develop or collect together the waters percolating in the soil upon said ranchos, or any part thereof, within the tracts where the rights of development and collection and diversion *is* alleged in said paragraph XIII to have been acquired or elsewhere, or that said Crystal Springs Land and Water Company did at an enormous or other expense or at all make excavations or any excavation or lay pipes or any
97 pipe within the portions of the said Los Felis and San Rafael ranchos mentioned in said bill or elsewhere.

These defendants deny on information and belief that the complainant Crystal Springs Land and Water Company did develop of the percolating waters in the soil mentioned in paragraph XIII of said bill of complaint about 700 inches of water under a four-inch pressure, or any other amount of water, or that said waters alleged in said paragraph to have been developed by said Crystal Springs Land and Water Company or any part thereof was conducted by said Crystal Springs Land and Water Company, under or by virtue of the pretended rights alleged in said paragraph to have been acquired from the owners of said lands or otherwise, to a point to connect the conduits with the system of water works owned by the complainant Los Angeles City Water Company, or elsewhere, or that said Crystal Springs Land and Water Company by the grants from the owners of the portions of said Ranchos Los Felis and San Rafael, where said developments are alleged in said paragraph XIII to have been made or otherwise, became vested with the right to make such excavations or excavation or any other excavation, or to own, take, divert, or use the waters which said Crystal Springs Land and Water Company might by the alleged works mentioned in said paragraph develop or by said pipes or any pipe or pipes divert.

These defendants upon information and belief deny that the complainant Crystal Springs Land and Water Company did acquire the waters mentioned in said paragraph XIII, or any part thereof, or the right to the use or disposition thereof, or did lease to the complainant Los Angeles City Water Company the said 700 inches of water mentioned in said paragraph, or any part thereof, or the right to take the same through the system of works alleged in said paragraph to be owned by said complainant, Los Angeles City Water Company, or through any other system, or to conduct the same or any part thereof into said Los Angeles city to supply said city or the inhabitants thereof with water for domestic purposes or for any other purposes or at all.

98 These defendants admit that on the 13th day of December, 1886, the complainant Los Angeles City Water Company made a pretended deed of conveyance to said complainant, Crystal Springs Land and Water Company, whereby said Los Angeles City Water Company did purport to convey, without consideration, certain pretended water rights, lands, and water works, and also that

on the 30th day of December, 1886, said complainant, Crystal Springs Land and Water Company, made a pretended lease to the complainant Los Angeles City Water Company, purporting to lease to said Los Angeles City Water Company all of the property so purported to have been conveyed to said Crystal Springs Land and Water Company by said last-mentioned deed of conveyance, as aforesaid, upon the terms that ssaid Los Angeles City Water Company would pay to said Crystal Springs Land and Water Company monthly 40 per cent. of the gross earnings and receipts realized by said Los Angeles City Water Company from the sale of water during the term of said pretended lease, to wit, eleven years from January 1st, 1887; but these defendants allege upon information and belief that said Crystal Springs Land and Water Company was organized and incorporated in the month of November, 1886, by all of the then stockholders of the complainant Los Angeles City Water Company, and that all of the capital stock of said Crystal Springs Land and Water Company was, upon its incorporation, subscribed and taken by said stockholders of said Los Angeles City Water Company in the same proportion in which said stockholders then held the capital stock of said Los Angeles City Water Company, and that the capital stock of said Crystal Springs Land and Water Company has ever since been held by all of the stockholders of said Los Angeles City Water Company in the same proportion in which they have held the capital stock of said Los Angeles City Water Company, and that at the time of the execution of said last-mentioned pretended deed of conveyance and at the time of the execution of said last-mentioned pretended lease all of the stockholders of said Los Angeles City Water Company were and composed all of the stockholders of said Crystal
99 Springs Land and Water Company, and said stockholders of said Los Angeles City Water Company then held and owned all of the stock of said Crystal Springs Land and Water Company in the same proportions in which they then held and owned the capital stock of said Los Angeles City Water Company, and that both of said companies were at the time of the incorporation of said Crystal Springs Land and Water Company and ever since have been practically one company and controlled by the same stockholders and officers, and that the pretended incorporation of said Crystal Springs Land and Water Company was simulated and noeffected in good faith, and was procured by the stockholders of said Los Angeles City Water Company for the purpose of making it the apparent owner of all of the property and rights of said Los Angeles City Water Company outside of the said city of Los Angeles and in order to pretend that said Los Angeles City Water Company was incurring an expense for the rental of the water and other property used by it in supplying water to the city of Los Angeles and its inhabitants; and these defendants allege on information and *d*elief that in truth and fact said Los Angeles City Water Company never paid and has never been under any obligation to pay to any person or corporation other than said defendant city any rental for the use of any water furnished to the city of Los Angeles or its inhabitants,

but all of the pretended rental mentioned in said pretended lease has always been divided among all of the stockholders of said complainant, Los Angeles City Water Company, in proportion to the amount of capital stock in said company held by them respectively.

7. These defendants deny that at the time mentioned in paragraph XIV of said bill of complaint or at any other time the acquisition of a further water supply was necessary to enable the complainant Los Angeles City Water Company to perform the pretended contract mentioned in said paragraph or to supply the inhabitants of
100 the city of Los Angeles with water, but, on the contrary, these defendants allege that said defendant city was always ready, able, and willing to furnis- a full and adequate supply of water for all of the purposes needed by said complain-t, and especially sufficient water f- the Los Angeles river, mentioned in the pretended contract — forth in paragraph IV of said bill, to supply said city an- — inhabitants with water for domestic use and all other pur- for a reasonable charge and price, not exceeding that which said Los Angeles City Water Company pretended to contract to pay said Crystal Springs Land and Water Company in and by said simulated lease mentioned in paragraph VIII of said bill.

8. That these defendants have no information upon the subject sufficient to enable them to answer the allegations of the bill of complaint in reference thereto, and they therefore deny that in the acquisition of the alleged water rights mentioned in paragraph XV of said bill, or in the alleged development or collection of the alleged percolating water mentioned in said paragraph, or in the construction of the pipes to carry said waters, or in the purchase or laying of the water pipes throughout the city of Los Angeles mentioned in said paragraph for the purpose of supplying said city with water, as in said alleged contract provided, or for any other purpose or at all the Crystal Springs Land and Water Company expended a large or other amount of money or about three millions of dollars or any other sum whatever, or that said Los Angeles City Water Company expended for all or any of said purposes or any other purpose or at all a large or other amount of money or three millions of dollars or any other sum whatever exceeding the sum of seventy-five thousand dollars; and these defendants allege upon information and belief that all of the moneys, if any, which have been expended by the complainant Los Angeles City Water Company and Crystal Springs Land and Water Company or either of them in or about any of the property and water works mentioned in said
101 bill of complaint or in or about any water works, including water rights and waters and other property used for the purpose of supplying water to said city of Los Angeles and its inhabitants, have been fully paid out of the water rates derived by said Los Angeles City Water Company from the sale of water to the inhabitants of said city, and in addition thereto the stockholders of said Los Angeles City Water Company have received and divided among themselves, from water rates derived from the sales of water to the inhabitants of said city, immense sums of money, aggregating several millions of dollars, and that the income which will be received

by said stockholders from the water rates collected by said Los Angeles City Water Company for supplying water to the inhabitants of said city, according to the rates fixed by the ordinance sought to be set aside in this suit, will be far in excess of the income derived from ordinary investments or from loans on mortgage security of an amount of money equal to the value of all property used by said Los Angeles City Water Company in supplying water to said city of Los Angeles and its inhabitants.

9. These defendants allege that they have no information upon the subject sufficient to enable them to answer the allegations of said bill in reference thereto, and they therefore deny that the complainants Los Angeles City Water Company and Crystal Springs Land and Water Company or either of them has contracted a bonded indebtedness of $409,000 or any other sum, or that to secure the payment of said indebtedness or any other indebtedness said companies or either of them did convey to the complainant S. G. Murphy the alleged properties and water rights mentioned in paragraph XVI of said bill, or any part thereof, to secure the payment of said alleged indebtedness or any other indebtedness to the holders of said alleged bonds or otherwise, or that said S. G. Murphy still holds the said property or any part thereof under said alleged deed of trust to secure said alleged bonded indebtedness, or any other indebtedness mentioned in said paragraph, or any part
102 thereof, or that said bonded indebtedness of said companies or of either of them or any part thereof is still outstanding or unpaid on said alleged deed of trust.

These defendants deny that in and by said pretended lease mentioned in paragraph XVI of said bill only twenty-five per cent. of the gross receipts from water rates were purported to be agreed to be paid to said Crystal Springs Land and Water Company, but alleges that forty per cent. of said gross receipts was in said pretended lease purported to be agreed to be paid by said Los Angeles City Water Company to said Crystal Springs Land and Water Company as rental for the use of the property pretended to be leased by said pretended lease.

These defendants deny that the complainant Los Angeles City Water Company has acquired the pretended contract rights mentioned in said paragraph XVI, or since the 1st day of January, 1880, has been furnishing to said city, for municipal and public uses ementioned in said paragraph, or for any other municipal use or purpose, the water alleged in said paragraph to have been furnished by said complainant to said city in pursuance of the alleged contract set forth in paragraph IV of said bill; but, on the contrary, these defendants allege that said defendant city has taken the said water so used by it for municipal purposes mentioned in said paragraph as water belonging to it and coming from said Los Angeles river; and these defendants allege that said complainant, Los Angeles City Water Company, in the latter part of August, 1878, endeavored to force the defendant City of Los Angeles to pay for water taken by it from the hydrants erected by said company and used for sprinkling the streets of said city, but the defendant City of Los

Angeles refused to pay the same, on the ground that said water belonged to said defendant city as part of the Los Angeles river, and that by the judgment of the district court in and for said county of Los Angeles and by the judgment of the supreme court of said State it was determined that said waters belonged to the defendant City of Los Angeles as part of the Los
103 Angeles river, and that the defendant City of Los Angeles, as owner thereof, had good right to take the same from the pipes of the complainant Los Angeles City Water Company for all municipal purposes, and for this and no other reason the said complainant, Los Angeles City Water Company, has acquiesced in the defendant City of Los Angeles taking water from the pipes of said complainant for municipal purposes of said city; and these defendants further allege that for several years last past the complainant Los Angeles City Water Company has been supplying water to the inhabitants of said city and to said defendant city through water systems erected by various persons and corporations under licenses from said defendant city providing expressly that the defendant City of Los Angeles should have the uncontrolled and absolute right and power to regulate the water rates to be charged for water supplied to the inhabitants of said city through their said systems, and also that water should be furnished to said defendants city from said systems for all municipal purposes free of charge; and these defendants deny that said complainant, Los Angeles City Water Company, has performed or is still performing all of the terms and conditions of said pretended contract on its part to be performed.

10. These defendants deny that in the year 1870 or at any other time commissioners or any commissioner was appointed by said city for the purpose of ascertaining or determining the amount of rates that were charged for furnishing water to the inhabitants of said city at the date of said pretended contract mentioned in paragraph IV of said bill, or any of said rates, or that after investigation or examination or otherwise said commissioners or committee or any of them reported or said council accepted the rates set forth in paragraph XVII of said bill or any of them as being the rates charged at the date of said pretended contract, or that said rates alleged in said paragraph to have been ascertained and determined by said commissioners or any of them were accepted by said city, or that it was agreed between said city and said Los Angeles City Water Company that said rates or any other rates or any of them should be accepted as the minimum rates to be charged by said Los Angeles City Water Company under said pretended contract.

104 11. These defendants deny that the pretended contract mentioned in paragraph IV of said bill of complaint was ratified by the act of the legislature mentioned in said paragraph XVIII of said bill or by any other act of the legislature or at all.

These defendants allege that the pretended act of the legislature mentioned in said paragraph XVIII, purporting to declare that the following acts and contracts and ordinances of the mayor and common council of the said city of Los Angeles were thereby ratified and confirmed, to wit, the contract and lease for the care and main-

tenance of the Los Angeles City water works, entered into and made between the mayor and common council of the city of Los Angeles, on the one part, and John S. Griffin, Prudent Beaudry, and Solomon Lazard, on the other part, dated the 20th day of July, 1868, and also the ordinance confirmatory of the same, passed July 22nd, 1868, which contract and ordinance were recorded in the office of the county recorder of Los Angeles county, in Book 1 of Miscellaneous Records, at pages 428–431, and also two certain concessions from said corporation to William G. Dryden, his heirs and assigns, concerning rights of way and water, and the ordinance authorizing the same, passed February 24th, 1857, and December 8th, 1857, respectively, and recorded in the aforesaid recorder's office, in Book 2 of Deeds, pages 453 and 449 respectively, and a certain conveyance to to Hiram McLaughlin, his heirs and assigns, from said corporation, dated August 6th, 1858, and recorded in Book 4 of Deeds, pages 225, '6, and that said pretended act of the legislature did not purport to enact any other thing or matter whatsoever.

These defendants allege that at the date of the passage and approval of said pretended act of the legislature, and at the time the same was to take effect by its terms, the said John S. Griffin, Prudent Beaudry, and Solomon Lazard had not, nor had any one of them, any right, title, interest, or estate of, in, or to any of the
105 property, rights, or privileges purported to be given, conceded, or conveyed or agreed to be given, conceded, or conveyed to said Griffin, Beaudry, and Lazard in and by said pretended contract set forth in paragraph IV of said bill; but, on the contrary, all of their right, title, interest, and estate of, in, and to all of the property, rights, and privileges purported to be given, conceded, or conveyed to them in and by said pretended contract had been previously, to wit, not later than the 12th day of June, 1869, conveyed by them to the complainant Los Angeles City Water Company and ever since that date up to the present time have been owned by said Los Angeles City Water Company.

These defendants allege that at the time of the passage and approval of said pretended act of the legislature it was expressly provided by the constitution of the State of California that the legislature of said State should have no authority to create private corporations, but that the same should be formed under general laws, which might be altered from time to time or repealed, and that it was the rule of decision of the supreme court of the State of California at the time of the passage and approval of said pretended act and ever since that any act of the legislature which had the effect of granting a special franchise to any private corporation was in violation of and contrary to said constitutional provision and was null and void; and these defendants allege that said pretended act of the legislature, in so far as it purported to ratify or confirm the provisions of said pretended contract set forth in paragraph IV of said bill, purporting to prohibit the mayor and common council of the city of Los Angeles and its successors and the legislature of said State from establishing water rates to be charged by said Griffin, Beaudry, and Lazard and their assigns for water to be furnished

to the inhabitants of said city of Los Angeles for domestic purposes under said pretended contract below those then charged by said Griffin, Beaudry, and Lazard, was repugnant to and in violation of said constitutional provision and was null and void and of no effect.

106 And these defendants further allege upon information and belief that it was the intention of the said Griffin, Beaudry, and Lazard at the time of entering into said pretended contract set forth in said paragraph IV of said bill to organize themselves and certain associates who were then and there interested with them in procuring said contract into a private corporation under an act of the legislature of the State of California entitled "An act for the incorporation of water companies," approved April 22nd, 1858, and said Griffin, Beaudry, and Lazard and their said associates did shortly afterwards, on the 18th day of August, 1868, prepare, sign, and file with the county clerk of Los Angeles county, State aforesaid, a certificate of incorporation under said last-mentioned act of the legislature for the formation and incorporation of the complainant Los Angeles City Water Company, and that in and by said certificate of incorporation it was stated that the objects for which said corporation was formed were to supply the inhabitants of said city of Los Angeles with water for domestic purposes, and to conduct the same into and distribute the same through the streets and alleys of said city by means of pipes, tubes, hydrants, flumes, ditches, wheels, reservoirs, pumps, and other machinery, said water to be taken from said Los Angeles river or the zanjas or branches thereof or springs forming the same, or from such other source of supply as said corporation might find convenient and economical, and to make certain improvements and to sell and distribute water to the inhabitants of said city for domestic purposes under the terms of said pretended contract set forth in paragraph IV of said bill.

That thereafter, on the 26th day of August, 1868, said Los Angeles City Water Company was duly formed and incorporated under said certificate of incorporation and under said last-mentioned act of the legislature as a water company, and that the incorporators thereof were said Griffin, Beaudry, and Lazard and their said associates.

107 That, as these defendants are informed and believe, said pretended contract was procured by said Griffin, Beaudry, and Lazard and their said associates in trust for said water company, and to convey said pretended contract to said company as soon as it should be incorporated, and, in truth and fact, all of the conditions and covenants of said pretended contract contained on the part of said Griffin, Beaudry, and Lazard, which were in fact performed, were so performed by said Los Angeles City Water Company, and not by said Griffin, Beaudry, and Lazard, and said Griffin, Beaudry, and Lazard did not, nor did any of them, ever comply with any of the terms or conditions of said pretended contract, or do anything thereunder, but ever since the alleged execution of said pretended contract the complainant Los Angeles City Water Company has been in the sole and exclusive possession, manage-

ment, and control of the water works purported in said pretended contract to be leased, and all of the rights, privileges, and property acquired by said Griffin, Beaudry, and Lazard under or by virtue of said pretended contract.

That in and by said statute approved April 22nd, 1858, it was provided that water rates to be collected by any corporation formed thereunder should be reasonable and should be determined by a board of commissioners, of whom two were to be selected by the city authorities of the city wherein such corporation furnished water and two by the water company, and in case the four could not agree to the valuation, then all four of said commissioners were to choose a fifth person, and if they could not agree, such fifth commissioner was to be appointed by the sheriff of the county wherein such city was situated, and said commissioners so to be selected or appointed should determine the rates to be charged by said company for one year or until new rates should be established.

That at the time of the alleged execution of said pretended contract set forth in paragraph IV of said bill it was provided by an act of the legislature of the State of California then in force
108 entitled "An act to provide for the incorporation of water companies," passed May 3rd, 1852, that no contract between any city of said State and any company organized to supply such city with water should take from such city the absolute and uncontrolled right to regulate the rates for water supplied to the inhabitants of such city.

That said Griffin, Beaudry, and Lazard and their said associates delayed making a formal conveyance to said complainant, Los Angeles City Water Company, until the 12th day of July, 1869, but, as hereinbefore alleged, said company acted as the owner of all of the rights, privileges, and property acquired by said Griffin, Beaudry, and Lazard under and by virtue of said pretended contract and of all the water works and other property used for the supplying of water to said city from the time of the incorporation of said company up to said formal conveyance in the same manner as it did subsequently to the execution of said conveyance.

These defendants have no information or belief upon the subject sufficient to enable them to answer the allegations of said bill in reference thereto, and they therefore deny that the rates set forth in paragraph XVII of said bill, or any of them, were agreed upon by the parties to said pretended contract as the rates charged at the time said pretended contract was made or were the rates that were charged at the time of the execution of said pretended contract

12. These defendants deny that the defendant City of Los Angeles has, ever since the making of said pretended contract set forth in paragraph IV of said bill of complaint, or at any other time, recognized the existence of said pretended contract, or that said defendant has in every year or at any other time demanded of said complainant, Los Angeles City Water Company, the performance of the various terms and conditions of said pretended contract on its part, or any of them.

109 These defendants admit that the council of said city has from time to time requested said complainant to do various things agreed in said pretended contract by said Griffin, Beaudry, and Lazard to be done by them and their assigns, but deny that such request has been made in recognition of the validity of said pretended contract; but, on the contrary, allege that said complainant, Los Angeles City Water Company, ever since its said incorporation, has been in possession of the water works of the defendant City of Los Angeles, mentioned in said pretended contract, and has been making use of the streets and public ways of said city and the lands of said defendant for the purpose of constructing reservoirs and other works and laying pipes for the supplying of water to the inhabitants of said city, and has during all that time used large quantities of waters of said Los Angeles river, the property of said defendant, for that purpose, and said defendant has merely acquiesced in said complainant, Los Angeles City Water Company, supplying water to the inhabitants of said city during said period as being a tenant at will of said defendant, which tenancy was terminable at any time at the option of said defendant, and up to the 20th day of October, 1896, consented to the taking of the waters of said river by said complainant, and the benefits, advantages, and emoluments gained and received by said complainant, without taking into consideration the waters of said river so used by said complaina-t as aforesaid during the whole of said period up to the present time have afforded an immense and generous and more than reasonable remuneration and compensation to said complainant and its stockholders for all the services which it has performed in doing the acts mentioned in paragraph XIX of said bill, and that the income derived by said complainant and its stockholders from the water rates received by it during said period for supplying the inhabitants of said city with water has always been far in excess of the reasonable interest upon the investment of said complainant in all of the property used by it in so supplying water to said inhabitants.

110 These defendants deny that said complainant, Los Angeles City Water Company, during all of the time mentioned in said paragraph XIX or during or at any other time, furnished water for sprinkling the streets of said city and for all the public uses and purposes mentioned in said paragraph or any of them, in accordance with said pretended contract and not otherwise, or that the defendant City of Los Angeles has been accepting said waters alleged in said paragraph to have been provided and furnished by said Los Angeles City Water Company for said purposes, as furnished or provided under said contract; but, on the contrary, these defendants allege that the defendant City of Los Angeles has, during all of said time, taken all of the water furnished or provided to it by said Los Angeles City Water Company free of charge as water belonging to said defendant, and taken from said Los Angeles river, and which the Los Angeles City Water Company had no right to sell or dispose of to others, as determined by the decision of the supreme court of the State of California hereinbefore referred to.

These defendants allege that said complainant, Los Angeles City

Water Company, ever since its incorporation, has continuously taken the water from said Los Angeles river belonging to said defendant city, varying in quantity from a few inches, measured under a four-inch pressure in the beginning, and gradually increasing in amount until the same amounted to several hundred inches measured under a four-inch pressure, and that shortly before the 20th day of October, 1896, said defendant notified said complainant not to take any more water from said river in excess of the ten inches mentioned in said pretended contract; but, notwithstanding said notice and without the consent, previous or otherwise, of said defendant, said complainant, Los Angeles City Water Company, has, ever since said last-mentioned date, continuously taken from said Los Angeles river a large quantity of water thereof belonging to said defendants, amounting to several hundred inches measured under a four-inch pressure, in utter disregard and willful
111 violation of the provisions of said pretended contract wherein said Griffen, Beaudry, and Lazard did, for themselves and assigns, purport to covenant not to take any water from said river in excess of ten inches without the previous consent of the predecessor of said defendant, the mayor and common council of the city of Los Angeles.

These defendants deny that the city of Los Angeles or any of its predecessors or said mayor and common council of the city of Los Angeles ever recognized any contract obligation of said Los Angeles City Water Company to do or perform all the things purported to be agreed to be performed by said Griffen, Beaudry, and Lazard and their associates, or any of said things, under said pretended contract, or has recognized or insisted upon the right of said city of Los Angeles to receive the benefits of said pretended contract or all or any of the benefits provided for in said pretended contract; but these defendants allege that all of the things which said defendant city has ever required of said Los Angeles City Water Company were demanded by said defendant as from a tenant at will who was obligated to do anything which said defendant might require, or in default thereof to abstain from using any of the property of said defendant or exercising any franchise in said city.

13. These defendants deny that under or by virtue of said pretended contract set forth in paragraph IV of said bill said complainant, Los Ang-les City Water Company, is obligated to lay pipes or supply water to the inhabitants living in any territory which was not at the date of said pretended contract included within the territorial limits of said municipal corporation known at that time as the mayor and common council of the city of Los An-eles; and these defendant- allege that the ter-itory then included in said territorial limits is only a small portion of the present territory included within the present limits of said city.

14. These defendants allege upon information and belief that said pretended contract was procured by said Griffen,
112 Beaudry, and Lazard for the benefit and use of said complainant, Los Angeles City Water Company, and that at the

time of the incorporation of said complainant and at the time of the formal assignment of said pretended contract to it, as hereinbefore alleged, the laws of the State of California expressly provided that it should be competent to amend or modify in any respect whatever or utterly repeal the charter and all laws under which said complainant was incorporated, and that the law-making power of said State ever since the incorporation of said complainant had full authority to enact the provisions of the constitution of said State set forth in paragraph XXI of said bill and to enact the statute set forth in paragraph XXII of said bill, and also to enact the provisions of the charter of said defendant city set forth in paragraph XXIII of said bill, and that all of said constitutional provisions, statutes, and charter have ever since their enactment respectively applied to and bound in every respect said complainant and the other complainants herein.

15. These defendants deny that said provisions of the constitution of the State of California set forth in paragraph XXI of said bill of complaint or any of them impair the alleged obligation of said pretended contract set forth in paragraph IV of said bill, or any contract with said Los Angeles City Water Company, or are in violation of the provisions of the Constitution of the United States prohibiting any State from passing any law impairing the obligation of any contracts or any other provision of the Constitution of the United States, or that said provisions of said constitution or the acts of the legislature mentioned in paragraph XXV of said bill are, or any one of them is, in violation of the said provision of the Constitution of the United States or in violation of amendment XIV to the Constitution of the United States, prohibiting any State from depriving any person of life, liberty, or property without due process of law, and prohibiting the said State from denying to any person within their jurisdiction equal protection of the laws, or of any other
113 provision of the Constitution of the United States.

These defendants deny that the attempt in the constitution of the State of California and the acts of the legislature mentioned in paragraph XXV of said bill to create a condition in the estate of said Los Angeles City Water Company in its alleged property, mentioned in said paragraph, whereby said title is to be defeated, is an attempt to deprive said Los Angeles City Water Company of its property without due process of law.

16. These defendants deny upon information and belief that, under the provisions of the ordinance set forth in paragraph XXVI of said bill at the rates therein fixed, the revenues of said Los Angeles City Water Company would be reduced more than forty per cent., or any per cent., or at all, below an amount which it would receive at the rates alleged in said paragraph to have been charged in 1868 for the same services; but, on the contrary, these defendants allege upon information and belief that said company would not have charged any higher rates than those fixed in said ordinance had not the same been enacted, as said last-mentioned rates were more than a full, fair, and reasonable compensation for the services performed, and said complainant, Los Angeles City

Water Company, would not have charged higher rates for fear of inviting other persons and corporations into competition with them in supplying water to the inhabitants of said city.

These defendants allege that in truth and fact said complainant voluntarily and prior to the year 1880 reduced rates for water supplied by it to the inhabitants of said city of Los Angeles far below those set forth in paragraph XVII of said *bi*bill, and that ever since and including the year 1880 up to and including the year 1895 the council of said city has yearly and with the acquiescence and consent of said complainant, Los Angeles City Water Company, and acting in pursuance of the constitutional provisions, statutes, and charter set forth in paragraphs XXI, XXII, and XXIII of
114 said bill, established and fixed the water rates to be charged by said complainant for water furnished to the inhabitants of said city of Los Angeles far below those set forth in said paragraph XVII of said bill, and that in truth and fact said provisions of said pretended contract, purporting to prohibit said mayor and council from reducing the water rates to be charged by said Griffen, Beaudry, and Lazard under said pretended contract, were, in consideration of many advantages and benefits received from the defendant City of Los Angeles and its predecessor by said Los An-eles City Water Company, waived and abandoned by said Los Angeles City Water Company many years prior to the passage of said ordinance set forth in paragraph XXVI of said bill, and said provisions of said pretended contract have never been observed or carried into effect or recognized by this defendant or said Los Angeles City Water Company since the year 1879.

And these defendants on information and belief deny that under the provisions of said last-mentioned ordinance the ability of said Los Angeles City Water Company to make the necessary extensions and construct the necessary improvements to meet the wants and keep up with the progress of said Los Angeles city will be greatly or at all impaired, or that the amount of the rent which said Crystal Springs Land and Water Company would receive will be forty per cent. less than it is entitled to receive, or that the ability of said Los Angeles City Water Company to pay its interest upon outstanding bonds or to maintain the operating expenses or repairs or improvements necessary for the proper administration of any system or to comply with said pretended contract set forth in paragraph IV of said bill will be greatly or at all impaired, or that said Los Angeles City Water Company or said Crystal Springs Land and Water Company will be deprived of any revenues which it ought to receive or will be unable in any respect to carry on its business or any business or to properly perform said pretended con-
115 tract; but, on the contrary, these defendants allege on information and belief that said Los An-eles City Water Company would not and could not have collected any greater rates for water supplied by it to the inhabitants of said city of Los Angeles than those set forth in said ordinance mentioned in paragraph XXVI of said bill had said ordinance not been passed.

17. These defendants deny that if said Los Angeles City Water

Company should attempt to take more than the rates fixed in said last-mentioned ordinance the defendant City of Los Angeles would claim that the property of said Los Angeles City Water Company was forfeited to said defendant or would attempt to enforce such forfeiture.

These defendants deny that the complainants or any of them cannot maintain all rights which they might possess under the several pretended contracts set forth in said bill, except at the peril of the loss of their property mentioned in paragraph XVII of said bill or any other property, or at the peril of the certainty of their being greatly or otherwise interfered with by said City of Los Angeles in their attempts to maintain or operate said property.

18. These defendants deny upon information and belief that the matter in dispute in this suit exceeds, exclusive of interest and costs or otherwise, the sum or value of $150,000 or any other sum or value, but, on the contrary, this defendant alleges upon information and belief that said complainants do not in good faith contest said ordinance set forth in paragraph XXVI of said bill, and do not in good faith contend that the rates therein fixed are not reasonable and fair, or that said rates are below those which would have been charged by said Los Angeles City Water Company of its own motion, and that the sole and only object of complainants in bringing this suit is to endeavor to have the question of the title to the alleged percolating waters mentioned in said bill tried in this court under the
116 guise and pretense that said complainants are endeavoring to contest said last-mentioned ordinance and in order to attempt to confer jurisdiction on this court by raising questions in regard to the invalidity of said last-mentioned ordinance as being repugnant to the Constitution of the United States.

Wherefore these defendants, having shown to this court by this answer that it has no jurisdiction of this cause, prays that said bill of complaint be dismissed for want of such jurisdiction; and, having thus made answer fully to said bill, these defendant- pray to be hence dismissed with costs.

W. E. DUNN,
City Attorney,
LEE & SCOTT,
Solicitors for said Defendant-.

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

E. L. Blanchard, being duly sworn, says that he is one of the defendants named in the foregoing answer; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

E. L. BLANCHARD.

Subscribed and sworn to before me this 7 day of Sept., A. D. 1897.

[SEAL.] ROBERT A. TODD,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) No. 734. U. S. circuit court, so. dist. of California. Los Angeles City Water Co. *et al.*, compl'ts, *vs.* City of Los Angeles *et al.*, def'ts. Answer of Herman Silver *et al.* Received copy of within answer this 7th day of Sept'r, 1897. White & Monroe and J. S. Chapman, sol'rs for complainants. Filed Sep. 7, 1897. Wm. M. Van Dyke, clerk. W. E. Dunn, Lee & Scott, rooms 411–414 Bullard block, Los Angeles, California, sol'rs for def'ts.

117 In the Circuit Court of the United States, Ninth Circuit, for the Southern District of California.

LOS ANGELES CITY WATER COMPANY, Crystal Springs Land & Water Company, and S. G. Murphy, Complainants,
vs.
THE CITY OF LOS ANGELES ET AL., Defendant.
} No. 734. Replication.

The Replication of the Above-named Complainants to the Answer of the Above-named Defendant, The City of Los Angeles.

These replicants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto say that they do and will ever maintain and prove their said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these replicants; without that that, any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly as in and by their said bill they have already prayed.

J. S. CHAPMAN,
WHITE & MONROE,
Solicitors for Complainants.

118 (Endorsed:) No. 734. Circuit court of the United States, ninth circuit, southern district of California. Los Angeles City Water Co. *et al.*, complainant-, *vs.* The City of Los Angeles, defendant. Replication. Received copy of the within this 22 day of Sept., 1897. W. E. Dunn & Lee & Scott, attorneys for def'ts. Filed Sep. 23, 1897. Wm. M. Van Dyke, clerk. White & Monroe, rooms No. 11–13 Temple block, Los Angeles, Cal., solicitors for complainants.

119 In the Circuit Court of the United States, Ninth Circuit, for the Southern District of California.

Los Angeles City Water Company, Crystal Springs Land & Water Company, and S. G. Murphy, Complainants, *vs.* The City of Los Angeles, Hermann Silver, Z. D. Matthus, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, Defendants.	No. 734.	Replication.

The replication of the above-named complainants to the answer of the above-named defendants, Hermann Silver, Z. D. Matthus, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker.

These replicants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendants, for replication thereunto say that they do and will ever maintain and prove their said bill to be true, certain, and sufficient in the law to be answered unto by said defendants, and that the answer of said defendants is very uncertain, evasive, and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said an-
120 swer contained material or effectual in the law to be replied unto to, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly as in and by their said bill they have already prayed.

J. S. CHAPMAN,
WHITE & MONROE,
Solicitors for Complainants.

(Endorsed:) No. 734. Circuit court of the United States, ninth circuit, southern district of California. Los Angeles City Water Company *et al.*, complainants, *vs.* Herman Silver *et al.*, defendants. Replication. Received copy of the within this 23 day of September, 1897. W. E. Dunn & Lee & Scott, attorneys for def'ts. Filed Sep. 23, 1897. Wm. M. Van Dyke, clerk. J. S. Chapman & White & Monroe, rooms No. 11–13, Temple block, Los Angeles, Cal., solicitors for complainants.

121 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS Land & Water Company, and S. G. Murphy, Complainants,

vs.

THE CITY OF LOS ANGELES, HERMAN SILVER, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, Composing the Council of the City of Los Angeles, Defendants. } No. 734.

The complainants filed their bill of complaint herein on the 4th day of March, 1897; which bill of complaint is hereto annexed.

A subpœna to appear and answer in said cause was thereupon on said 4th day of March, 1897, issued, returnable on the 5th day of April, 1897, which is hereto annexed.

On the 5th day of April, 1897, the defendants, The City of Los Angeles, Herman Silver, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchinson, F. M. Nickell, and F. L. Baker, appeared herein by W. E. Dunn, Esq., their solicitor, and Messrs. Lee & Scott, of counsel.

The exceptions of defendant The City of Los Angeles to the bill of complaint were filed herein on the 7th day of June, 1897, and *is* hereto annexed.

The exceptions of the defendants Herman Silver *et al.* to the bill of complaint were filed herein on the 7th day of June, 1897, and *is* hereto annexed.

122 The demurrer of defendant The City of Los Angeles to the bill of complaint was filed herein on the 7th day of June, 1897, and is hereto annexed.

The demurrer of defendants Herman Silver *et al.* to the bill of complaint was filed herein on the 7th day of June, 1897, and is hereto annexed.

On the 15th day of June, 1897, the court made and entered herein an order allowing the 4th and 5th of the exceptions of defendant The City of Los Angeles to the bill of complaint and overruling the others, a copy of which order is hereto annexed.

On the 15th day of June, 1897, the court made and entered herein an order allowing the 4th and 5th of the exceptions of defendants Herman Silver *et al.* and overruling the others, a copy of which order is hereto annexed.

On the 21st day of June, 1897, the court made and entered an order herein amending the order made and entered herein on the 15th day of June, 1897, allowing the 4th and 5th exceptions taken by defendant The City of Los Angeles to complainants' bill of complaint, a copy of which order is hereto annexed.

On the 21st day of June, 1897, the court made and entered herein an order amending the order made and entered herein on the 15th day of June, 1897, allowing the 4th and 5th exceptions taken by the

defendants Herman Silver *et al.* to complainants' bill of complaint, a copy of which order is hereto annexed.

On the 29th day of July, 1897, the court made and entered an order herein overruling the demurrer of defendant The City of Los Angeles to complainants' bill of complaint, a copy of which order is hereto annexed.

On the 29th day of July, 1897, the court made and entered herein an order overruling the demurrer of defendants Herman Silver *et al.* to complainants' bill of complaint, a copy of which order is hereto annexed.

123 On the 7th day of September, 1897, the answer of defendant The City of Los Angeles to the bill of complaint was filed herein and is hereto annexed.

On the 7th day of September, 1897, the answer of defendants Herman Silver *et al.* to the bill of complaint was filed herein and is hereto annexed.

The replication of complainants to the answer of defendant The City of Los Angeles was filed herein on the 23rd day of September, 1897, and is hereto annexed.

The replication of complainants to the answer of defendants Herman Silver, Z. D. Matthus, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hitchinson, F. M. Nickell, and F. L. Baker was filed herein on the 23rd day of September, 1897, and is hereto annexed.

On the 14th day of February, 1898, being a day in the January term, A. D. 1898, of said circuit court of the United States for the southern district of California—present, the Honorable Olin Wellborn, district judge—the stipulation of facts made by the solicitors for the parties to this cause having been filed herein, said cause was thereupon submitted to the court for its consideration and decision upon the pleadings, the said stipulation of facts, and upon briefs which were thereafter filed on behalf of the respective parties.

On the 31st day of May, 1898, the court made and entered an order herein that a decree in favor of complainants, conformable to the opinion of the court on that day read, be entered herein, and on the 20th of June, 1898, a final decree in accordance with the terms of said order was signed, filed, entered, and recorded herein, and is hereto annexed:

124 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

LOS ANGELES CITY WATER COMPANY, CRYSTAL Springs Land & Water Company, and S. G. Murphy, Complainants, *vs.* THE CITY OF LOS ANGELES, HERMAN SILVER, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, Composing the Council of the City of Los Angeles, Defendants.	No. 734.	Decree.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the contract set out in the bill of complaint herein and entered into on the 22nd day of July, 1868, between the city of Los Angeles and J. S. Griffin, P. Beaudry, and Solomon Lazard, in so far as said contract provides that the city shall not reduce the water rates below those charged on the date of said contract, is valid, and that the ordinance set out in said bill of complaint passed by the council of the city of Los Angeles at its meeting on February 23rd, 1897, purporting to regulate the rates and compensation allowed to be collected by any person or corporation supplying water for domestic and private purposes to inhabitants of the city of Los Angeles during the year commencing July 1, 1897, and ending June 30, 1898, did reduce the water rates below those charged on the date of said contract and impaired the obligation of said contract, and said ordinance is null and
125 void; and it is further ordered, adjudged, and decreed that said ordinance be, and the same is hereby, vacated and set aside and held for naught.

It is further ordered, adjudged, and decreed that the complainants recover their costs herein against the defendants, taxed at — dollars.

It is further ordered, adjudged, and decreed, pursuant to the stipulation of the parties, that this decree shall neither be conclusive upon the title to either party to this suit to lands, rights of way, waters and water rights, and easements of all descriptions mentioned in the bill of complaint herein, nor shall this decree be admissible in evidence in any other litigation between the complainants and defendants or any of them upon the question of title to said properties.

OLIN WELLBORN, *Judge.*

June 20, 1898, Los Angeles, Cal.

Decree entered and recorded June 20th, 1898.

WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 734. Circuit court of the United States, ninth circuit, southern district of California. Los Angeles City Water Co. *et al.*, complainants *vs.* The City of Los Angeles *et al.*, defendants. Final decree. Filed Jun- 20, 1898. Wm. M. Van Dyke, clerk. Stephen M. White, rooms 11–13 Temple block, Los Angeles, attorney for ——.

126 Whereupon said bill of complaint, subpœna, exceptions of defendant The City of Los Angeles, exceptions of defendants Herman Silver *et al.*, demurrer of defendant The City of Los Angeles, demurrer of defendants Herman Silver *et al.*, copy of order allowing 4th and 5th of the exceptions of defendant The City of Los Angeles, copy of order allowing 4th and 5th exceptions of defendants Herman Silver *et al.*, copy of order modifying order allowing 4th and 5th exceptions of defendant The City of Los Angeles, copy of order modifying order allowing 4th and 5th exceptions of defendants Herman Silver *et al.*, copy of order overruling demurrer of defendant The City of Los Angeles, copy of order overruling demurrer of defendants Herman Silver *et al.*, answer of defendant The City of Los Angeles, answer of defendants Herman Silver *et al.*, replication of complainants to answer of the City of Los Angeles, replication of complainants to answer of Herman Silver *et al.*, and said final decree are hereto annexed, said final decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, etc.:

[SEAL.] WM. M. VAN DYKE, *Clerk.*

(Endorsed:) No. 734. In the circuit court of the United States, ninth judicial circuit, for the southern district of California. Los Angeles City Water Co. *et al. vs.* The City of Los Angeles *et al.* Enrolled papers. Filed June 20th, 1898. Wm. M. Van Dyke, clerk. Recorded, Decree Register Book No. 2, page 256.

127 In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants, *v.* THE CITY OF LOS ANGELES ET AL., Defendants. } No. 734.

Opinion of the Court on Final Trial.

This suit, which is now under submission on the pleadings and an agreed statement of facts, was brought to annul an ordinance of the council of the city of Los Angeles, adopted February the 23rd, 1897, fixing water rates during the year commencing July the 1st, 1897, and end.ng June the 30th, 1898, on the ground that said ordinance impairs the obligation of the contract hereinafter mentioned, and is therefore repugnant to the constitution of the United States.

The material facts of the case are these:

On July the 22nd, 1868, the city of Los Angeles, as party of the first part, and John S. Griffin, P. Beaudry, and Solomon Lazard, as parties of the second part, entered into a contract whereby said city, for the consideration below indicated, leased its water works
128 to said Griffin, Beaudry, and Lazard and their assigns for a term of thirty years, with the right to lay pipes in the streets and sell and distribute water for domestic purposes to the inhabitants of said city, and to receive the profits thereof, and with the additional right to take water from the Los Angeles river at a point at or above the present dam, provided that the said parties of the second part should at no time take from said river for the use of said water works more than ten inches of water without the previous consent of the mayor and common council of said city, and that they would, within sixty days from the date of the contract, select the point where the water should be taken from said river, and the city bound itself not to make any other lease, sale, contract, grant, or franchise to any person, corporation, or company for the sale or delivery of water to the inhabitants of said city for domestic purposes during the continuance of the contract, and reserved the right to regulate water rates as follows: "Always provided that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said parties of the second part or their assigns, provided that they shall not so reduce such water rates or so fix the price thereof to be less than those now charged by the parties of the second part for water."

For the lease and grants aforesaid the parties of the second part undertook and promised to pay said city a yearly rental of fifteen hundred dollars; to cancel certain claims of said parties against said city, amounting to about eight thousand dollars; to lay down in the streets of said city twelve miles of iron pipes of sufficient capacity to supply the inhabitants of said city with water for domestic purposes and extend said pipes as fast as the citizens desiring water for domestic purposes would agree to take sufficient water to pay ten per cent. per annum upon the cost
129 of such extensions, and erect one hydrant, as protection against fire, at one corner of each crossing of streets where pipes were or might thereafter be laid; to erect an ornamental fountain on the public plaza, at a cost not to exceed one thousand dollars; to construct and erect, within two years, such reservoirs, machinery, ditches, and flumes as would secure to the inhabitants of said city a constant supply of water for domestic purposes; to furnish water free of charge for the public-school houses, hospitals, and jails; to keep in repair all of said improvements, at the cost and expense of the parties of the second part, for said term of thirty years, and to return said water works to said party of the first part at the expiration of said term in good order and condition, reasonable wear and damage of the elements excepted, upon payment to said parties of the value of the aforesaid improvements, to be ascertained as provided for in the contract; to give a bond in the sum of twenty thousand dollars for the performance of said contract, and to pay all

State and county taxes assessed upon said water works during said period of thirty years.

Griffin, Beaudry, and Lazard applied for and procured said contract on behalf and for the benefit of themselves and other persons, with the intention of forming a corporation to carry out said contract, and afterwards, about the middle or latter part of August, 1868, themselves and said other persons being the incorporators, organized, under the laws of the State of California, the Los Angeles City Water Company, for the purpose of supplying the inhabitants of said city with water for domestic purposes, etc., under the terms of said contract, and assigned all their rights and franchises under said contract to said company by a written instrument dated June
the 12th, 1869, and recorded in the office of the recorder of
130 said county of Los Angeles, June the 15th, 1869.

On April the 2nd, 1870, the legislature of California passed an act hereinafter set forth, in terms ratifying and confirming said contract.

Griffin, Beaudry, and Lazary did nothing personally in carrying out said contract or constructing or maintaining said water works, but said company, after it was organized, took possession of said water works, and has performed all of the above-mentioned obligations of said contract, except the one providing for the return of the water works at expiration of lease, and, in such performance, has laid 320 miles of pipe, erected over 500 hydrants for protection against fire, and constructed six reservoirs, with an aggregate capacity of nearly sixty-six millions of gallons, and is now, as it has been at all times since the contract was made, furnishing the city of Los Angeles with water for the extinguishment of fires and for the public schools, hospitals, and jails in said city, free of charge. The aforesaid extensions of the water works were rendered necessary by the growth of said city, whose population in 1868 was between 5,000 and 6,000, and is now about 103,000.

During the whole of the year 1868 the territorial limits of the city of Los Angeles were as follows: Four square leagues in a square form, the center of which was the center of the old pueblo plaza.

About 1872 the limits were extended 420 yards south of the former south boundary, and within the past three years, and prior to July, 1897, the limits were further extended so as to take in between ten and fifteen square miles of additional adjoining territory. Immediately after the extension of the said limits, the Los Angeles City
Water Company began to extend its pipes over the said ad-
131 dition to the city as the same was settled up and improved,
and ever since has been and is now furnishing water to the people in said district added to the original territory of the city, and, upon the demands of the city council, erected fire-hydrants within the said additional territory and furnished water free of charge, and has in all respects continued to lay pipes, erect fire-hydrants, and furnish the inhabitants with water for domestic uses in like manner as it has conducted the same business within the original limits of the city as established by the act incorporating it, and so with the more recent extensions of the city limits, to wit,

those made within the last three years, the company has also extended its pipes in portions of those limits and furnished water in the same way.

The quantity of water required to supply the domestic wants of the people of said city is one inch of water, measured under a four-inch pressure, to every one hundred inhabitants. To meet the increased demands upon it for water under said contract said company has, among other things, purchased the system known as the Beaudry system of water works, and also certain water rights in the Arroyo Seco, and conducted water from the Arroyo Seco into the city on the east side of the Los Angeles river, and has been furnishing the inhabitants of that portion of the city with water from said system, and also acquired the stock of the corporation known as the East Side Spring Water Company, the same mentioned in paragraph 10 of the complaint.

In the growth of the city its settlement extended to localities of higher elevation than those occupied by its inhabitants at the time of said contract, and the point originally selected for the diversion of the water of the Los Angeles river for supplying the city and its inhabitants, as in said contract provided, was so located in
132 said river that it was impracticable to there maintain dams and diversion works that would not occasionally be swept away or rendered useless by floods, and the surface water of the river after severe storms became muddy and unfit for supplying the inhabitants with water for domestic uses, and in the year 1889 the Crystal Springs Land and Water Company made excavations in the places referred to in the bill of complaint and laid the pipes therein as alleged, and the water that has been used by the Los Angeles City Water Company for supplying the city with water, as provided in said contract, has ever since been obtained from that source, except that from time to time a further supply of water has been taken from the Los Angeles river in order to supply said inhabitants, which diversions have been at or near the place where the said underground pipes are laid, and that by these means the water can be delivered to the higher elevations, and the underground waters, as to quality and amount, are thus protected against the influences of floods.

The Los Angeles City Water Company ever since its incorporation has taken more than ten inches of water, measured under a four-inch pressure, from the Los Angeles river, and the amount taken has increased with the increase of the population of the city and the demands of the municipality itself for water for extinguishing fires and the other public purposes referred to in the said contract, and the amount has increased until now it requires from 1,000 to 1,500 inches of water, measured under a four-inch pressure, for such purposes, and during the summer season the amount of water used by the Los Angeles City Water Company for the purposes aforesaid runs from 1,000 to 1,500 inches under a four-inch pressure, inclusive of the water obtained by the underground excavations, which latter furnish from 650 to 690 inches, measured under a four-
133 inch pressure.

The city of Los Angeles has always had flowing in the Los

Angeles river, at the point from which said Los Angeles City Water Company has always diverted water from said river, a quantity of water sufficient to have supplied said Los Angeles City Water Company with all the water required to supply said city and its inhabitants with water for domestic purposes and municipal uses, and has never objected, up to October 20, 1896, to said Los Angeles City Water Company taking as much water from said river as it might require for said uses, and during all of said period said city has never objected to said company's taking from the surface stream of said river at said point as much water as said company needed for said uses.

On October the 19th, 1896, the council of the city of Los Angeles adopted a resolution requiring the Los Angeles City Water Company to pay to the city of Los Angeles an amount of money equal to forty per cent. of the gross rates received by said company from the consumers of water as rental for all water taken by said company from the Los Angeles river, and before the 21st day of October, 1896, to attorn to the city of Los Angeles, as tenant of said city, for all of the water so taken from said river, and to agree to pay said rental to said city, and in case of failure to attorn and agree to pay said rental, to refrain from diverting, taking, or interfering with any of the water mentioned in said resolution (except ten inches) after the 20th day of October, 1896.

On October the 19th, 1896, the city attorney, in writing, notified the Los Angeles City Water Company and the Crystal Springs Land and Water Company of said resolution and demanded compliance therewith, delivering a copy of said resolution to each of
134 said companies. Neither of them ever attorned to said city for said water or any part thereof or ever agreed to pay any rental for the same. After the passage of said resolution and ever since said notification, up to the present time, the Los Angeles City Water Company has continually taken from the Los Angeles river, at a point above the northern boundary of said city, for the purposes of distribution and selling the same in said city, a quantity of water varying from 400 to 1,000 inches, measured under a four-inch pressure.

On the 19th day of April, 1870, the common council of the city of Los Angeles accepted, and the mayor approved, the following report:

"To the honorable the mayor and common council of the city of Los Angeles and the Los Angeles City Water Company:

"The undersigned, commissioners duly appointed on behalf of your honorable bodies to adjust, fix, and establish the rates and charges of the Los Angeles City Water Company (a corporation duly incorporated under the laws of the State of California for the purpose of supplying the inhabitants of Los Angeles city with pure, fresh water), respectfully report that they have established water rates and charges for domestic purposes, taking as a guide as near as can be the charges and rates for domestic purposes charged in July, 1868; that your committee have also fixed the rates and

charges for other reasonable objects and purposes, and report as follows, to wit: "

Then follow the rates agreed upon.

The commissioners referred to in said report had been previously selected, two by the city and two by the Los Angeles City Water Company.

In June, 1871, the city council, on a report of a committee constituted similarly to the one above mentioned, established
135 the same rates as those established in April, 1870.

On the 13th of August, 1874, a committee, constituted in the same manner and for the same purposes as the committee already mentioned, reported that they had established water rates and charges for domestic purposes, taking as a guide, as near as possible, the charges and rates for domestic and other reasonable objects and purposes charged in July, 1868. The report was adopted and a committee appointed in conjunction with the city attorney to draft an ordinance embodying the rates fixed in said report, and thereafter, on August the 20th, 1874, an ordinance so drawn was adopted by the council of said city, and the rates established by said ordinance were the same as those established in 1870 and 1871.

Since and including the year 1880 the city council of the city of Los Angeles has in February of each year passed an ordinance fixing the rates to be charged by all corporations and persons within said city supplying water to the inhabitants thereof, to be in force for one year from and including July the 1st, which rates have been less than the rates charged in 1870, as contained in the ordinance hereinbefore mentioned, and the Los Angeles City Water Company has collected the rates thus fixed by the city of Los Angeles, and no more, but in the year 1896 the council of the city of Los Angeles passed an ordinance fixing the rates to be charged for water for the year commencing July the 1st, 1896, and ending June 30th, 1897, at less than they had ever been fixed before, and a suit was then brought by the complainants herein in this court against the city of Los Angeles to set aside the said ordinance, and in February of the year 1897 the city of Los Angeles passed the ordinance which is assailed in this suit, making a still further reduction in the rates.

136 The action of the Los Angeles City Water Company in collecting the rates fixed by said several ordinances constitutes the only acquiescence (if it be an acquiescence) in the action of said council.

If the rates established in 1870 were collected for the year beginning July the 1st, 1897, and ending June the 30th, 1898, the revenues received by the Los Angeles City Water Company from said rates would be more than fifty thousand dollars in excess of the amount which would be received under the rates named in the ordinance of February, 1897.

In January, 1882, the Los Angeles City Water Company furnished to the council of the city of Los Angeles a statement of its transactions for the preceding year, protesting at the same time against the establishment of any rates less than those which were in force

at the date of the lease hereinbefore mentioned, to wit, July the 22nd, 1868.

In January, 1883, said company again furnished said council with a statement showing the names of the consumers of water, the rates paid during the year preceding the date of the statement, and also an itemized statement of the expenditures made for supplying water during the year preceding, but expressly denying any legal right on the part of the council to demand said statement or to fix any rates less than those which were in force in July, 1868.

Similar statements, accompanied by similar protests, were made annually thereafter up to and including the year 1889, and since that time unverified statements or reports showing its receipts and expenditures have been made by said company to the city council each year.

Article XIV of the present constitution of California, adopted in 1879, is as follows:

137 "ARTICLE XIV.

"*Water and Water Rights.*

"SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law: Provided, that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company, or corporation to the city and county, or city or town where the same are collected, for the public use.

"SEC. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or
138 the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

To carry out these provisions of the constitution, the legislature of California passed an act entitled "An act to enable the board of

supervisors, town council, board of aldermen," etc., which was approved March the 7th, 1881. (Statutes of California 1881, page 54.)

In the year 1888 the electors of the city of Los Angeles, pursuant to provisions of the constitution of said State authorizing them so to do, adopted a charter for said city, which charter was, under the provisions of said constitution, submitted to the legislature of said State for its approval, ratification, and adoption, and the said charter was, on the 31st day of January, 1889, adopted by said legislature, and thereupon became and ever since has been the charter of the said city of Los Angeles, and by the said charter it is provided, in section 192, as follows:

"The rates of compensation for use of water to be collected by any person, company or corporation in said city shall be fixed annually by ordinance and shall continue in force for one year, and no longer. Such ordinance shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Should the council fail to pass the necessary ordinance fixing the water rates within the time hereinbefore prescribed, it shall be subject to peremptory processes to compel action at the suit of any party interested."

The ordinance of 1897 now sought to be annulled was passed pursuant to the foregoing constitutional and statutory provisions.

The facts showing the connection of S. G. Murphy and the Crystal Springs Land and Water Company with the litigation
139 need not be enumerated, since the defendants waive all questions as to the joinder of these parties, and said facts are not material to any point determined in this opinion.

The agreed statement of facts contains certain stipulations in regard to the issues submitted, which are likewise immaterial here, but which will be carried into the final decree.

Complainants' contention, succinctly stated, is that said ordinance of February, 1897, impairs the obligation of the contract of July the 22nd, 1868, between the city of Los Angeles and the assignors of the Los Angeles City Water Company, Griffin, Beaudry, and Lazard, in that the rates fixed by said ordinance are less than the rates charged at the date of said contract, and therefore said ordinance is repugnant to the Constitution of the United States and ought to be annulled. This contention clearly involves a question of Federal cognizance.

The defenses to the suit are as follows:

First. That said contract, in so far as it purports to limit the right of the city to regulate water rates, was on the part of the city unauthorized and is void.

Second. That the evidence fails to show that the rates fixed by said ordinance of 1897 are less than the rates that were charged by the assignors of said water company at the date of said contract.

Third. That said water company, since October the 20th, 1896, has continuously violated a material provision of said contract by taking from the Los Angeles river more than ten inches of water measured under a four-inch pressure.

Fourth. That there has been such acquiescence by the water company in the right of the city to regulate water rates unrestrained by said contract as now precludes complainants from obtain-
140 ing the relief sought.

Fifth. That the injuries resulting from said ordinance are not irreparable, and complainants have adequate legal remedies.

These defenses will be considered separately and in the order of their statement.

1. A question has been raised by the defendants as to the proper construction of that clause of the contract above mentioned limiting the right of the city to regulate water rates, and it will be best to determine that question before passing upon the validity of said clause. The contention of defendants is that said clause refers exclusively to a right of regulation given the city by the contract itself, and was not intended as a limitation upon any power which had been or might thereafter be conferred by the legislature of the State. This contention is not well taken. The contract does not grant nor purport to grant to the city any right in respect to the regulation of rates, the language being that "the mayor and common council of said city shall have, and do reserve, the right to regulate water rates," etc. The use of the word "reserve" shows that the parties were contracting, not with reference to a right which it was supposed the lessess were granting to the city, but with reference to a power or right which they assumed the city already possessed. The parties manifestly intended by the clause now under consideration that the lessees should have a right to the minimum rates prescribed, namely, the rates that were then charged, and if the city was authorized to make such an agreement, neither it nor the legislature of the State could thereafter lawfully reduce the rates below the minimum so agreed upon. Whether or not these minimum rates are collectible by actions at law before they have been established by the city need not be determined here. I now
141 come to the question of authority.

The city of Los Angeles was incorporated by an act of the legislature of California passed April the 4th, 1850, which simply described the boundaries of the city and declared it to be incorporated according to the provisions of the act entitled "An act to provide for the incorporation of cities," passed March the 11th, 1850, fixed the number of councilmen at seven, and made said city successor to all the rights, claims, and powers of the pueblo of Los Angeles in regard to property.

Section 2 of the aforesaid act of March 11, 1850, is as follows:

"§ 2. When any city is incorporated by a special act of the legislature, such act may simply define the boundaries of the city, and declare it incorporated, in which case it shall be deemed incorporated according to the provisions of this act; or may declare it incorporated under the same, with such changes as may be specially named."

Section 7 of said act gives to any city incorporated thereunder power to grant franchises, hold and receive property, real and personal, within said city; to lease, sell, and dispose of the same for

the benefit of said city (Statutes of California, 1850, page 86). Section 11 of the same act provides that the city council "shall have the power * * * to establish a fire department, and to make regulations to prevent and extinguish fires; * * * to provide for supplying the city with water."

Did these acts of the legislature empower the city of Los Angeles to make the agreement in question?

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers
142 expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied * * *" (1 Dillon on Municipal Corporations, § 89, p. 115).

This text is cited with approval by defendants in their brief and, without referring to the numerous cases also cited in the same connection, may be accepted as a clear summary of the law on the subject to which it relates.

The power of the city of Los Angeles to agree upon water rates, I think, is fairly implied in the power "to provide for supplying the city with water," and therefore falls within the second class of powers enumerated by Judge Dillon.

Two cases, and only two cases, directly in point have been called to my attention: Santa Ana Water Company *v.* Town of San Buenaventura, 56 Fed. Rep., 339, and Illinois Trust and Savings Bank *v.* City of Arkansas City, 76 Fed. Rep., 271. Both of these cases sustain the conclusion which I have just announced, and in the former case, where the facts were strikingly analogous to those in the case at bar, Judge Ross held valid an agreement whereby the town of San Buenaventura granted to the assignors of the Santa Ana Water Company "the unrestrained right to establish such rates for the supplying of water to private persons as they may deem expedient, provided that such rates be general." From the opinion of Judge Ross I quote as follows:

"The doctrine is firmly established that the State may by a contract restrict the exercise of some of its most important powers," citing New Orleans Gas Co. *v.* Louisiana Light, etc., Co., 115 U. S., 650, and Waterworks Co. *v.* Rivers, 115 U. S., 674. "* * * The principle controlling the decisions cited is a just and plain
143 one. The duty is imposed upon the legislative power that creates a municipal corporation to provide for the necessary elements of gas and water. It may, at its discretion, do so directly or it may, in the absence of any constitutional inhibition, say directly or through the municipal corporation so created to its individual citizens, in the language of the Supreme Court (Binghampton Bridge, 3 Wall., 74): 'If you will embark with your time, money, and skill in an enterprise which will accommodate the public necessities, we will grant to you for a limited period or in perpetuity

privileges that will justify the expenditure of your money and the employment of your time and skill.' Such a grant, said the court in the case from which the quotation is taken, 'is a contract with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.'"

Defendants cite a large number of cases to the effect that a general power conferred upon a municipal corporation to supply the city with water does not include authority to grant an exclusive franchise therefor to others. This proposition, however, is not now before the court, since the defendants admit that the fact of an exclusive franchise having been granted to the complainants' assignors, if such was the case, does not vitiate the contract in other respects. To my mind there is a clear and broad distinction, so far as concerns the power of a municipal corporation to make them, between the grant of an exclusive franchise to supply the city with water and an agreement which abridges the right of such corporation to regulate the price of the water so supplied. The grant of an exclusive franchise is not an indispensable or even an appropriate means to the procurement of water, and, besides, creates a monopoly (and it is upon these grounds that many of the decisions holding
144 such grants inoperative are rested), while an agreement fixing the price to be paid for water does not destroy nor is it inimical to competition and is both appropriate and indispensable to a reasonable and convenient exercise of the general power to supply water. In procuring water or any other commodity by purchase one of the first things to be considered and agreed upon is the matter of price. Therefore, to hold that general power without limitation in a municipal corporation to supply the city with water does not include power to agree upon price, it seems to me, would be a solecism.

In State *v.* La Clede Gaslight Co., 102 Mo. Rep.; S. C., 22 Amer. State Rep., 795, the court says:

"It is not open to doubt or dispute that this power to make and vend gas carries with it as an invariable incident the right to fix the price of the gas thus made and sold. No other conclusion can be drawn from the premises. A sale implies a price. It would be but the granting of a barren right, indeed, which would confer power to incur expense and perform labor and yet deny the power to fix and to reap the fruits of that labor, to wit, the price. Whatsoever the law necessarily implies in a statute or in a contract is as much part and parcel thereof as if expressly stated therein. So that by the terms of the charter of the respondent company its right to fix the price of its product was as much a part of its charter as if it had been in terms set forth in section 5 of the original act of incorporation."

The words of the grant in the case at bar, "power * * * to provide for supplying the city with water," are clear and unambiguous and, in my opinion, admit of no other reasonable construction than that they were intended to confer upon the city of Los Angeles, so far as concerns the means necessary to supply
145 the city with water, powers as ample as the legislature itself

possessed. This delegation of power to the city was not, of course, a relinquishment by the legislature of its control over the subject. The legislature could at any time revoke the power delegated to the city and provide directly through agencies of its own selection for supplying the city with water, provided such revocation or provision should not impair any previously vested rights.

In Illinois Trust and Savings Bank *v.* City of Arkansas City, *supra*, the words of the grant were: "Full power and authority to contract for and procure water works to be constructed for the purpose of supplying the inhabitants of such cities with water." While this phraseology is more diffuse, the grant it makes is neither clearer nor broader than the grant in the case at bar, and with reference to the former the court of appeals for the eighth circuit said:

"The powers granted to this city by the legislature of the State of Kansas to contract for and procure water works are plenary and unlimited save by the duty to exercise them with reasonable discretion, and it is not the province of the court to contract or clip the legislative grant."

Grants of this power have been upheld, in some well-considered cases, on the ground that the power is a business or proprietary power, as distinguished from a governmental or legislative power (Illinois Trust and Savings Bank *v.* City of Arkansas City, *supra;* Cincinnati *v.* Cameron, 33 Ohio St. Rep., 336, 367; Safety Insulated Wire & Cable Co. *v.* City of Baltimore, 66 Fed. Rep., 140; State *v.* Mayor, etc., of City of Great Falls, 49 Pac. Rep., 15, 21; 1 Dillon on Municipal Corporations, sec. 27). In the first of these cases the court says:

"In contracting for water works to supply itself and its
146 inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Corp., § 27; City of Cincinnati *v.* Cameron, 33 Ohio St., 336, 367; Safety Insulated Wire & Cable Co. *v.* City of Baltimore, *supra*, and cases cited under it."

In Cincinnati *v.* Cameron the court says:

"The power given to a city to construct sewers is not a power given for governmental purposes, nor is it a public municipal duty imposed upon the city like that of keeping streets in repair, but it is a special legislative grant to the city for private purposes. The sewers of the city, like its works, for supplying the city with water are the private property of the city; the corporation and its corporators—its citizens—are alone interested in them; the outside public, as people of the State at large, have no interest in them as they have in the streets of the city, which are public highways. Detroit *v.* Corey, 9 Mich., 165."

If, however, it be conceded, contrary to these authorities and as claimed by defendants, that the power of a city to regulate water rates is legislative or governmental the city may, by contract, abridge such power under an implied as well as an express legislative grant,

and this rule is recognized by many of the authorities upon which defendants rely. Thus, in one of them it is said:

"Powers are conferred upon municipal corporations for public purposes, and as their legislative powers cannot, as we have just seen, be delegated, so they cannot without legislative authority, express or implied, be bargained or bartered away. Such
147 corporations may make authorized contracts, but they have no power as a party to make contracts or pass by-laws which shall cede away, control, or embarrass their legislative or governmental powers or which shall disable them from performing their public duties" * * * (1 Dillon on Municipal Corporations, 4th edition, sec. 97).

It is worthy of note that the words "without legislative authority, express or implied," are not found in the first three editions of Judge Dillon's work. I take it, therefore, that a review of the subject made by him subsequent to said editions satisfied him that the governmental as well as business powers of a city could be abridged by contract if there were legislative authority therefor, and that such authority could arise by implication as well as by express grant. See also State *v.* Cincinnati Gas-light, etc., Co., 18 Ohio St. Rep., 293; Santa Ana Water Co. *v.* Town of San Buenaventura, *supra;* Illinois Trust and Savings Bank *v.* City of Arkansas City, *supra.*

As already stated, most, if not all, of the cases cited by defendants on this point—some of which are specially referred to below—relate to exclusive franchises, and in many of these cases the franchises are denied, not because they involve the exercise of governmental functions, but upon the grounds that they are monopolies and unnecessary to the accomplishment of the general objects of the grants, and herein lies the wide distinction between such cases and the case at bar.

In Jackson, etc., Co. *v.* Interstate, etc., Co., 24 Fed. Rep., 308, '9, it is said:

"Again, exclusiveness of occupation is not necessary to the full performance of a street railroad company of all its functions. The running of a street railroad on one street is in no manner interfered with by the running of a similar road on a parallel street.
148 Doubtless the profits of the one will be increased if the other is stopped. Monopoly implies increase of profits; but the question of profits is very different from that of the unimpeded facilities for transacting business. The latter may be granted without any exclusiveness, and power to grant all facilities for transacting business does not imply power to forbid all others from transacting like business. Even where a charter is granted by the legislature directly it grants no exclusive right unless the exclusiveness is expressly named. As said by Judge Dillon, 2 Mun. Corp., § 727:

"'But a legislative grant of authority to construct a street railway is not exclusive unless so declared in terms, and therefore the legislature may at will and without compensation to the first company authorize a second railway on the same streets or line unless

it has disabled itself by making the first grant irrepealable and exclusive.'

"And if a direct grant from a legislature carries no implication of exclusiveness, why should it be presumed that the legislature intended to vest in a city the power to give exclusive privileges when it has in terms granted no such power? Will the power to create monopolies be presumed unless it is expressly withheld? That would reverse the settled rule of construction, which is that nothing in the way of exclusiveness or monopoly passes unless expressly named."

Again, in another case relied on by defendants the grant of an exclusive right of selling to the city of Helena all water required by it, etc., for the period of twenty years was held to be void on the ground, among others, that it was a monopoly, the court saying:

"Then, the power to provide the city with water by making a proper contract with some person to erect water works and sell water to the city being conceded, the next question that pre-
149 sents itself is as to the power of the city to make this particular contract. Is the present such a contract as to be beyond the power of the city council to enter into so as to bind the municipal corporation? Does this contract create a monopoly? For, if it does, it goes beyond the power of a city council. Monopolies may be created, but they must be called into being by the sovereign power alone. A city council has no authority to grant to any person a monopoly, even where no express prohibition is found in the charter or other acts of the legislature. Monopolies are contrary to the genius of a free government, and ought not to be encouraged by the people or countenanced by the courts except when expressly authorized by positive law."

Not only does the court rest its decision upon the ground that the franchise was a monopoly, but it expressly recognizes the power of the city to abridge, by contract, in some degree its governmental functions, as follows:

"But it is insisted by the council for respondents that the making of this contract, or the passing of this ordinance, is *ultra vires*, because it ties up and embarrasses the functions of future councils. Every ordinance in the nature of a contract would do this to some extent, and unless the contract entered into by means of this ordinance should bind the city corporation for an unreasonable time, this objection would not be fatal."

The grant of power to the city in that case was as follows: "The city council shall have power to provide the city with water, erect hydrants and pumps, build cisterns, and dig wells in the streets for the supplying of engines and buckets, * * * to provide
150 for the prevention and extinction of fires." (Davenport *v.* Kleinschmidt, 13 Pac. Rep., 254.)

The court then holds that under the peculiar terms of the contract in question twenty years was an unreasonable time for it to continue. This feature of the case, however, I will consider in a subsequent and more appropriate connection.

In Illinois Trust & Savings Bank *v.* City of Arkansas City, 76 Fed. Rep., 279, the court says:

"This city, then, had the power to grant to the gas company the privilege of using its streets for water pipes, and it had power to rent hydrants of that company when this contract was made. For the purposes of this discussion we shall concede that it had no power to make the privilege of the gas company to use its streets exclusive, because such a grant tends to create a monopoly. The general rule is that the legislature alone has the power to make exclusive grants of this character, and that this authority does not vest in the municipality unless it is expressly granted to it by its charter."

In Omaha Horse Railway Co. *v.* Cable Tramway Co., 30 Fed. Rep., 328, the monopoly feature of the grant there under discussion was referred to thus:

"This rule of construction against the grantee, which applies in all legislative grants, obtains with the greater force in a case like the one at bar, where the grant claimed is not merely the right to do something, but of a right to exclude all the rest of the public from doing that thing. He who says that the State has given him a franchise, a right to do that which without that franchise he could not do, will be compelled to show that the franchise, the right claimed, is within the terms of his grant. Much more strenuous must be the demand upon him for clear and explicit language in his grant when he claims that a part of it is not merely the
151 franchise, the right to do, but also the right to exclude all others of the public from exercising the same right, and the State, as the representative of the public, from according the same right to another."

In Saginaw Gas-light Co. *v.* City of Saginaw, 28 Fed. Rep., 529, in considering the question whether the common council of that city had power to confer an exclusive franchise upon the plaintiff to light its streets with gas for thirty years, the court said:

"That the State in its sovereign capacity may grant a monopoly of this description, and that such monopolies will be protected against a subsequent conflicting grant has lately been settled by the Supreme Court in New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S., 650; S. C., 6 Sup. Ct. Rep., 252, and Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S., 683; S. C., 6 Sup. Ct. Rep., 265. But whether under a charter simply authorizing a municipal corporation 'to cause its streets to be lighted' it may grant an exclusive privilege of this description for a term of years is a widely different question. Bearing in mind that the powers of the municipality are strictly limited by its charter, it is needful to inquire whether the grant of an exclusive franchise is a proper and reasonable method of exercising its authority to furnish gas to its inhabitants. We think it entirely clear that the city is not bound to manufacture and furnish the gas itself, but may contract with any individual or company for the city, and as an incident thereto may authorize the use of its streets for laying pipes and mains. * * *

"It is clear, however, that there is no authority expressly given

to confer upon any corporation an exclusive right to occupy its streets for a number of years. * * *

"The common law of England declares that monopolies cannot emanate from the crown and can only be conferred by act of
152 Parliament (Bac. Abr., tit. 'Monopoly'), and a by-law which creates a monopoly is void. (Jac. Law Dict.)

"The great weight of authority in this country is in the same direction," etc.

In State *v.* Cincinnati Gas-light, etc., Co., 18 Ohio St. Rep., 293, the court says:

"Now, we concede that the streets of a city may be appropriated to authorized purposes promotive of the convenience and welfare of its inhabitants, and not substantially interfering with the public easement or right of travel; and from partial appropriations of this character rights of private property may arise which cannot rightfully be disturbed. But when it is sought to couple with such partial appropriation a stipulation that no further use of unoccupied portions of the streets shall be thereafter permitted or made for similar purposes, this is not the exercise of the power of appropriation, but an attempt to prohibit its exercise; and when the effect is to create a private monopoly, the power of the city council thus to divest itself of authority conferred upon it as a public agent for the benefit of others must be clearly shown."

In that case, however, the court holds that even the power to grant an exclusive franchise may arise by implication as well as from express terms, the language of the court being as follows:

"And, assuming that such a power may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through an agency of a municipal corporation clearly invested for police purposes with the necessary authority. But we have referred to these authorities as our justification for saying that when
153 a franchise so far in restraint of trade and so pregnant with public mischief and private hardship is drawn in question, and is claimed to be derived through a municipal ordinance or contract, the power of the municipal authorities to pass the ordinance or enter into the contract must be free from doubt. It must be found on the statute book in express terms or arise from the terms of the statute by implication so direct and necessary as to render it equally clear."

This review of defendants' citations shows that in each case the franchise claimed was denied not because it was legislative or governmental in its nature, but because it was a monopoly, and in the first case for the additional reason that the franchise was not necessary to the accomplishment of the general objects of the grant. Neither of these reasons apply to the case at bar. The abridgment of the right of the city to regulate water rates does not create a monopoly and is a necessary means to the proper exercise of the general power to supply the city with water.

Defendants further insist that the rates fixed by the ordinance of 1897 are not unreasonable, or, in other words, that they allow to complainants a fair income on their investment.

The question, however, as to the reasonableness or unreasonableness of the rates fixed by the ordinance is not here involved. The only question, so far as concerns the matter of reasonableness, is whether or not the contract of July the 22nd, 1868, was reasonable, and in determining this question the contract should be construed not in the light of developments that have since been made, but with reference to the conditions which surrounded the parties at the date of the contract.

The fact that said contract, because of the rapid growth of the city of Los Angeles, has proved largely remunerative to the complainants does not make the contract unconscionable. On
154 this point the following extract from the case of Illinois Trust and Savings Bank *v.* City of Arkansas City, *supra*, may be aptly quoted:

"It cannot but be clear to all who are familiar with the condition of cities of the second class—cities whose population was between 2,000 and 15,000—in the State of Kansas in 1872, when this grant was made, that it was not the intention of the legislature of that State to limit the terms of these contracts to the single year during which the terms of office of the members of the city councils continued. The cities were young and poor, but they were ambitious and sanguine. They did not have the ready money to construct the water works which the health and comfort of their inhabitants required. It is hardly possible that any individual or corporation could have been induced to expend the thousands of dollars required to construct such works as have been built in this city in consideration of the right to use the streets of the city for that purpose and of the promise of rental for its hydrants for the limited term of a single year. These facts the members of the legislature must have known, and they undoubtedly granted this plenary power to contract for the very purpose of enabling the cities to procure a supply of water for their inhabitants by grants of privileges to private parties to use their streets for that purpose for a reasonable term of years and by covenants to pay rentals for hydrants for a like term. In any event, the legislature made this grant, and it thereby vested in the mayor and council of the city the right to make such contracts for such terms as in their discretion they thought proper." (Illinois Trust and Savings Bank *v.* City of Arkansas City, 76 Fed. Rep., 283.)

In another case it has been held that "where a city with
155 a population of 5,000 and an assessed valuation of property of two and a quarter millions of dollars contracts with a person, giving him the exclusive privilege of laying water mains in the city for 30 years and providing that he shall furnish the city with 50 fire-hydrants, for each of which it shall pay him a rent of $80 *dollars* per year for the 30 years, with a stipulation that at the end of 10 years it may, at its option, buy the water works at a price commensurate with the productive value thereof, the contract will not, after the city has enjoyed the benefit of it for over 10 years, be held so unreasonably oppressive or contrary to public policy as to be

void." (Fergus Falls Water Co. *v.* City of Fergus Falls, 65 Fed. Rep., 586.)

It is noticeable that in the case last cited the city of Fergus Falls was paying $80 per year for each hydrant, while in the case at bar the city of Los Angeles gets the use of the hydrants, now 500 in number, free of charge.

In Davenport *v.* Kleinschmidt, *supra*, where the court held that twenty years was an unreasonable period for the continuance of the contract, the reasons for the ruling are thus stated:

"Is 20 years a reasonable time? The city charter provides for the election of the mayor and half the aldermen in April of each year. City charter, art. 4, § 1. The complaint alleges the taxable property of the city of Helena to be not more than $5,000,000; that the bonded indebtedness of the city amounts to $19,500; that the floating debt, in outstanding warrants, amounts to $15,000. Four per cent. of the taxable property of the city would amount to $200,000. The charter permits the levy of taxes to the extent of three mills on the dollar for general purposes and the same for fire department purposes. City Charter, p. 25, amend. 1885.
156 On the present valuation these levies might amount to $15,000 each if the the taxing power was exerted to the limit.

"The city of Helena was chartered in 1881. Twenty years ago it was a mining camp on the banks of Last Chance gulch, containing a few hundred people. The last official census of the city, taken in 1880, shows a population of not more than 4,000. Reliable data place the present population at about 10,000. The ordinance provides that Woolston shall receive for the water running through each of the first 150 hydrants provided for $20 per year out of the general fund and $80 per year out of the fire department fund, being $100 for each hydrant altogether, and amounting in the aggregate for the 150 hydrants to $15,000 per annum. Then, as the mains are extended, additional hydrants are required to be erected, and for these Woolston is to receive $13 per year out of the general fund and $52 per year out of the fire department fund, making in the aggregate $65 per year for each additional hydrant. If ten miles more of pipe should be laid, at least 100 additional hydrants must be paid for, at an annual cost of $6,500. If the whole cost of the 150 hydrants were to be paid out of the fire department fund it would take every dollar which could be placed into that fund at the present valuation. This ordinance is designed to be irrepealable and unchangeable for the period of 20 years. We have a right to consider all these things in determining whether or not 20 years is a reasonable time for such a contract to run. Under all the circumstances indicated, we cannot consider that the city council has the right to bind such a city as Helena by such a contract for so long a period. We are not called upon to indicate what would be a reasonable time for which the city might make such a contract, if at all. It is sufficient for us to say in this case that 20 years is
157 not a reasonable time. It is useless to argue that if the council has power to bind the city for 20 years it has the power to bind it for 100 or 1,000 years; or, on the other hand, to say that

if the council cannot bind the city for 20 years it cannot do so for 1 year or 1 month. Such assertions of extreme cases may answer for illustration, but as arguments they are fallacies which cannot bear the strong light of reason" (Davenport *v.* Kleinschmidt, 13 Pac. Rep., 256).

Thus it will be seen that the twenty-year limit in the contract was held unreasonable mainly, if not wholly, because of the expenditures which the city was annually incurring for hydrants. Here there is no such expenditure. If the city of Los Angeles, however, was paying for its hydrants at the lowest rate above mentioned, $65 per year for each hydrant, the expenditures on this account, there being 500 hydrants, would amount in the aggregate to $32,500 per annum. The case last cited, therefore, does not support, but is against, defendants' contention, for, according to the theory of that case, the large benefits which the city of Los Angeles has enjoyed under the contract of July 22nd, 1868, in the way of free water and hydrants for municipal uses, saves the contract, if there were nothing else to do so, from the charge of unreasonableness.

See also McBain *v.* City of Fresno, 112 Cal., 159–169, and State *v.* Mayor, etc., of the City of Great Falls, 49 Pac. Rep., 15–21.

Defendants further contend that the limitation in said contract as to water rates is void because of the act of May the 3rd, 1852 (Statutes of California, 1852, page 171). Said act, however, is not applicable to the case at bar, for the reason that Griffin, Beaudry, and Lazard, at the date of said contract, were not incorporated under that or any other act. The following extract from the case of Santa Ana Water Company *v.* Town of San Buenaventura, *supra*, is directly in point here:

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"A statute of the State, approved May 3, 1852 (St. 1852, p. 171), providing for the incorporation of water companies, declared, in its third section:

"'This act shall not give to any company the right to supply any city with water unless it shall be previously authorized by an ordinance, or unless it be done in conformity with a contract entered into between the city and the company. Any contracts hereafter so made shall be valid and binding in law, but shall not take from the city the right to regulate the rates for water, nor shall any exclusive right be granted, by contract or otherwise, for a term exceeding twenty years.'

"By this act it was declared, as will be observed, that no contract entered into between a city and a company incorporated under the provisions of the act should 'take from the city the right to regulate rates for water.' That provision had no application to Arnaz and his associates, for the reason that they were not incorporated under that or any other act" (Santa Ana Water Co. *v.* Town of San Buenaventura, 56 Fed. Rep., pp. 348–'9).

But it is insisted by defendants that even if the contract in question does not violate said act of 1852, it is inconsistent with the policy of the State as manifested in said act, citing 1 Dill. Mun. Corp., sec. 319.

Defendants, it seems to me, mistake the scope and purpose of said act of 1852. Said act was, as shown by its title, simply "an act to provide for the incorporation of water companies," and does not purport to abridge the powers of municipal corporations except in their dealings with the private corporations created under
159 said act. The power of municipal corporations in their dealings with individuals are unaffected by said act of 1852. Defendants' claim, therefore, that it was the policy of the State, as shown in said act, to apply its provisions to individuals when, by a familiar rule of construction, individuals are excluded therefrom is untenable. This is well illustrated by section 31, article 4, of the constitution of California of 1849, and the judicial interpretation thereof. That section prohibits the granting of franchises by special legislation to private corporations, yet the supreme court of the State holds, as hereinafter fully set forth, that grants of franchises to individuals are not within the prohibition.

It is insisted by defendants that the case at bar is distinguishable from that of Santa Ana Water Company *v.* Town of San Buenaventura, *supra*, and comes within the reasoning in San Francisco *v.* Spring Valley Water Works, 48 Cal., 493, because Griffin and his associates procured their contract with the intention of forming a corporation to carry out the same, and that soon thereafter, pursuant to said intention, the Los Angeles City Water Company, one of the complainants herein, was organized by them.

Now, I do not think that the power of the city to enter into the contract or the validity of the contract can be affected by the fact that the assignors of the water company, at the time they procured the contract, intended to assign it to a corporation thereafter to be formed. Suppose that, after the making of the contract, Griffin, Beaudry, and Lazard had changed their purposes and concluded to carry out the contract as individuals, and had actually done so, could it be contended that the contract, if today held by them, would be invalid because when they procured it they purposed its assignment to a contemplated corporation? No one, I think, would so contend.

160 The case of San Francisco *v.* Spring Valley Water Works, *supra*, is widely different from the case at bar. Here the contract was not conditioned upon the individuals to whom the franchise was granted (Griffin and his associates) organizing themselves into a corporation, while in San Francisco *v.* Spring Valley Water Works a condition similar to the one indicated did exist and was the essential ground of the decision, as shown by the following extract from the opinion of the court:

"This brings us to the consideration of the Ensign act, so called. The first seven sections confer upon Ensign and his associates certain privileges and impose upon them certain duties in respect to furnishing the city and county of San Francisco with water for the extinguishment of fires and other municipal uses. Section eight, already quoted, provides that 'This act shall not take effect unless the parties named in section one shall, within sixty days after its passage, duly organize themselves in conformity with the existing

laws regulating corporations now in force in this State.' The grant therefore was not to take effect until Ensign and his associates had become a corporation under existing laws. It took effect as a grant not to Ensign and his associates as private individuals, but to the corporation when formed. It was an attempt by the legislature to confer by special grant upon a private corporation about to be formed certain peculiar privileges and to subject it to certain duties not common to other corporations formed under the same general law. For the reasons already stated this was not within the constitutional power of the legislature. When Ensign and his associates became a corporation under the general law they took only such
rights as were derived from that law and were subject only
161 to such duties as it imposed. The legislature by special act
could not increase or diminish either" (San Francisco *v.* Spring Valley Water Works, 48 Cal., 514).

Nor does the present case come within the implied suggestion of the court in San Luis Water Co. *v.* Estrada, 117 Cal., 168, that the intention of individuals to organize a corporation to carry out the object of a franchise granted to them, other circumstances concurring, might invalidate the grant, for the reason that it does not appear in the case at bar that the city council acted with reference to such intention or had any knowledge of its existence, or that the contract was made for the purpose of evading the constitution. There is no intimation by the court in the case of the San Luis Water Co. *v.* Estrada that a mere intention on the part of the grantees undisclosed to the granting party could invalidate the grant. What the opinion in that case does suggest, and even that was outside the facts, is that if the individuals to whom a franchise is granted intend at the time of the grant to form a corporation to carry out their contract with the city and this intention is known to and acted upon by the city and the contract is made for the purpose of evading the constitution, then it is invalid. None of these circumstances, however, except the intention of the individuals, are shown to have existed here, while there are strong reasons for presuming that there could not have been any intention to evade the constitutional inhibition against grants of franchises to private corporations by special legislation. San Francisco *v.* Spring Valley Water Works, 48 Cal., 515, the first case to hold that the provision of the constitution which inhibited the creation of private corporations
by special legislation included the grant of a particular
162 franchise to a corporation already existing, was not decided
until July, 1874, more than six years after the date of the contract and more than four years after the ratifying act. That decision, therefore, could not have in any way affected the parties to said contract. State Telegraph Company *v.* Alta Telegraph Company, 22 Cal., 398, which, contrary to the ruling in the Spring Valley Water Works case, held that the grant of a private franchise to an existing corporation was not repugnant to the constitutional inhibition against the creation of private corporations by special legislation, was decided in July, 1863, which was five years prior to said contract, and it is reasonable to presume that the parties to said con-

tract accepted that decision as correct and final, and therefore there was no occasion for any purpose or effort to evade the constitution.

Defendants further contend that since the Los Angeles City Water Company was incorporated, subsequent to the act of April the 22nd, 1858 (Statutes of California, 1858, p. 218), providing, among other things, that water rates should be fixed by commissioners, of whom two were to be appointed by the water company and two by the city, and if they could not agree a fifth to be selected by the sheriff, and since the constitutional provision, hereinbefore quoted, prescribing a different mode of establishing water rates from that contained in the act of 1858, was in effect an amendment of said act (Spring Valley Water Works *v.* Schottler, 110 U. S., 362), binding upon corporations previously organized, said company can have no right to collect rates other than those established in the mode prescribed by the constitution, and that the fact of said company being the assignee of a contract which gave the grantees and their assigns the right in question cannot alter the case, as the company had no power to acquire such a right, quoting the following from People *v.*
163 Stanford, 77 Cal., 378–'9:

"The defendant The Potrero and Bay View Railroad Company claims the right to maintain a railroad and to run cars thereon upon the streets described in the answer, to collect fares, etc., under and by virtue of the act of April 2, 1866, purporting to grant to certain persons (alleged to be assignors of the Potrero and Bay View Company) the right to lay down and maintain an iron railroad along and upon certain streets, and upon acts amendatory thereof and supplemental thereto. The act of 1866 was not a grant of a mere proprietary interest in lands, but was if valid a grant of a franchise. The constitution of 1849 provided, 'Corporations may be formed under general laws, but shall not be created by special act,' etc. (art. 4, sec. 31). The true construction of that constitutional provision is that private corporations must derive their powers from general laws and not from special statutes (San Francisco *v.* Spring Valley Water Works, 48 Cal., 513). It follows that if the grant of the franchise of laying down and maintaining a railroad within the limits of San Francisco to certain persons therein named was a valid and operative grant, yet the defendant corporation acquired no right to the franchise by assignment from such persons. To uphold such assignment would be to give to the particular corporation through it a franchise which other corporations of the same class could acquire only by grant from the supervisors, as provided in the general laws (San Francisco *v.* Spring Valley Water Works, *supra*)" (People *v.* Stanford, 77 Cal., 378–'9).

Defendants' counsel, in their examination of the case last cited, evidently failed to observe the fact that the clause quoted by them and on which they rely was from the opinion of a depart-
164 ment, and that said clause was expressly overruled on rehearing by the court in bank as follows:

"As to other questions arising upon the answer, they relate to the special answer to the second count of the complaint, which count of the complaint was held in the former opinion to be bad.

We adhere to that opinion so far as it relates to these questions, except so far as it holds that a duly organized corporation cannot take an assignment from its lawful owners of a franchise to lay down and maintain a street railroad. This is based upon the constitutional provision that 'corporations may be formed under general laws, but shall not be created by special act' (art. 4, sec. 31). This provision applies to the formation or creation of corporations and to the powers directly conferred upon them by legislative enactment, and cannot, in our judgment, be construed as prohibiting the assignment of a franchise to a legally created corporation by persons having the lawful right to exercise and transfer the same" (People *v.* Stanford, 77 Cal., 371).

The other case cited by defendants in this connection, Spring Valley Water Works *v.* Schottler, *supra*, is directly against their contention, that the Los Angeles City Water Company could not acquire from individuals a contractual right to collect water rates other than those fixed in the mode prescribed by its charter. This is shown so clearly by Judge Ross in Santa Ana Water Co. *v.* Town of San Buenaventura, 56 Fed. Rep., 347–'8, already mentioned, that I quote from his opinion as follows:

"In the case entitled Spring Valley Water Works *v.* Schottler, 110 U. S., 347; 4 Sup. Ct. Rep., 48, the question arose whether the right conferred upon water companies organized under that act to participate in the fixing of the rates to be charged for water furnished by them constituted a contract protected by the
165 Constitution of the United States against impairment by subsequent action of the State. The court held that the provision in the statute of 1858 in respect to the fixing of water rates was but one of the corporate privileges granted by the State; that it was part and parcel of the charter of the corporation, and nothing else, and therefore fell within the power conferred by section 31 of article 4 of the constitution of the State, in existence when the act was passed to alter or repeal it. Chief Justice Waite, in delivering the opinion of the court, said:

"'The organization of the Spring Valley Company was not a business arrangement between the city and the company as contracting parties, but the creation of a new corporation to do business within the State and to be governed as a natural person or other corporations were or might be. Neither are the charter rights acquired by the company under the law to be looked upon as contracts with the city and county of San Francisco. The corporation was created by the State. All its powers came from the State, and none from the city and county. As a corporation it can contract with the city and county in any way allowed by law, but its powers and obligations, except those which grew out of contracts lawfully made, depend alone on the statute under which it was organized and such alterations and amendments thereof as may from time to time be made by proper authority. The provision for fixing rates cannot be separated from the remainder of the statute by calling it a contract. It was a condition attached to the franchises conferred

on any corporation formed under the statute and indissolubly connected with the reserved power of alteration and repeal.'

"It will be observed that while the court held that each and every right conferred by the statute under which the company was incorporated was a part and parcel of its charter, and that only, and therefore subject to alteration or repeal, the right of any company to contract with the city or town in any way allowed by law was expressly recognized and declared."

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Judge Ross later, at page 357, after referring to People *v.* Stanford, *supra*, announces his conclusion on the point under consideration as follows:

"The construction placed upon the constitution of the State by the highest court in existence under it is binding on this court, and under the construction thus adopted by the supreme court of California it is obvious that the complainant corporation was competent to take by assignment whatever rights the contract of January 4, 1869, conferred upon Arnaz and his associates and that were assignable by them."

Complainants urge another ground in support of the contract, namely, that if it was made without original authority on the part of the city it has been subsequently validated by the act of April the 2nd, 1870, which, so far as material here, is as follows:

"SECTION 1. The following acts, contracts and ordinances of the mayor and common council of the city of Los Angeles are hereby ratified and confirmed: The contract and lease for the care and maintenance of the Los Angeles City water works, entered into and made between the mayor and common council of the city of Los Angeles, on the one part, and John S. Griffin, Prudent Beaudry and Solomon Lazard, on the other part, dated the twentieth (20th) day of July, eighteen hundred and sixty-eight (1868); and also the ordinance confirmatory of the same, passed July the twenty-second (22d) eighteen hundred and sixty-eight (1868) which contract and ordinance are recorded in the office of the county recorder of Los Angeles county, in Book One of Miscellaneous Records, pages four hundred and twenty-eight (428) to four hundred and thirty-one (431) * * * " (Statutes of California, 1869–'70, pp. 635–'6.)

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Defendants argue that the effect of said act, if operative, would be to confer a franchise on the Los Angeles City Water Company, and therefore the act is violative of that provision of the constitution of the State then in force prohibiting the creation of private corporations by special act, citing Turnpike Co. *v.* Cole, 51 Cal., 381; San Francisco *v.* Spring Valley W. W., 48 Cal., 493, and other cases. The provision of the constitution referred to, section 31 of article 4, is as follows:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes."

This argument of defendants seems to me to be unsound. Assuming, for the purposes of said argument, that the city of Los Angeles was not originally authorized to make the contract of July the 22nd, 1868, still I think that the equivalent of such authority

was supplied by said act of April the 2nd, 1870, and said contract thereby made as valid as it would have been had full authority existed from the outset. Whatever a legislature may originally authorize it can, if the constitution under which it exists interposes no obstacle, subsequently ratify, and such ratification is equivalent to an original grant of power, operative by relation as of the date of the thing ratified. This, according to all the authorities, is the theory and effect of a ratifying act.

"Ratification, as it relates to the law of agency, is the express or implied adoption of the acts of another by one for whom the
168 other assumes to be acting, but without authority, and this results as effectually to establish the duties, rights, and liabilities of an agency as if the acts ratified had been fully authorized in the beginning" (Am. & Eng. Ency. of Law, 2nd ed., vol. 1, p. 1181).

"By the ratification of the unauthorized act the relation of principal and agent, with all the rights and duties incident thereto, is as fully established as if the authority had been conferred originally; the ratification relates back to the time of the performance of the acts, as expressed in the familiar maxim, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur*" (*idem*, p. 1213)—that is, "Every subsequent ratification has a retrospective effect, and is equivalent to a prior command" (1 Bouvier's Law Dictionary, p. 220).

Again, it has been said: "Until ratification, no liability to principal exists; but after ratification liability relates back to the time when the obligation was undertaken. In other words, to adopt the exposition of an eminent German commentator, when an agent undertakes an act for another person, the legal character of the act remains undetermined until such other person decides whether or no he will ratify. The contract is not void, but occupies the same position as one that is conditional. The third party contracting is bound from the time of the institution of the contract, and not merely from that of the ratification. The agent cannot, even in this intermediate period, release the third party from liability. *A fortiori* such release is not worked by the intervening death or other incompetency of the agent. * * *

"It has just been noticed that the principal, by the act of ratification, puts himself in his agent's place. From this it fol-
169 lows that the ratification acts retrospectively; and nowhere is this more unhesitatingly expressed than in the Roman law. The principal, so that law assumes, puts himself, by the ratification, back into the period in which the contract was executed. * * * (Wharton on Agency & Agents, secs. 76 & 77.)

In Grenada Co., etc., *v.* Brown, 112 U. S., 261, the court said:

"Since what was done in this case by the constitutional majority of qualified electors, and by the board of supervisors of the county, would have been legal and binding upon the county had it been done under legislative authority, previously conferred, it is not perceived why subsequent legislative ratification is not, in the ab-

sence of constitutional restrictions upon such legislation, equivalent to original authority."

Further, in the same case, the court quotes from Sykes *v.* Mayor, 55 Miss., 137, as follows:

"The idea implied in the ratification of a municipal act performed without previous legislative authority is, that the ratifying communicates authority, which relates back to and retrospectively vivifies and legalizes the act, as if the power had been previously given. Such statute is of the same import as an original authority."

See also Grogan *v.* San Francisco, 18 Cal., 590; McCauley *v.* Brooks, 16 Cal., 27; Ralphs *v.* Hensler, 97 Cal., 296; Zottman *v.* City of San Francisco, 20 Cal., 97, and Taylor *v.* Robinson, 14 Cal., 396.

From these authorities it results that the act of April the 2nd, 1870, is in legal contemplation the same as an act conferring power originally upon the city to make the contract with Griffin and his associates. Such, indeed, is the admission of defendants themselves in one paragraph of their brief, which is as fol-
170 lows:

"The act does not purport to vest in the city the power generally to make contracts with reference to providing a supply of water, but it attempts to confirm a particular contract, and is of exactly the same nature as if an act had been passed prior to the execution of the contract specially authorizing the city to enter into it."

Now, if the legislature had passed an act prior to the execution of the contract with Griffin, Beaudry, and Lazard specially authorizing the city to enter into said contract with said parties, such an act would have been valid, for, as already shown, the constitutional inhibition against the creation of private corporations by special legislation does not include grants of franchises to individuals.

My views in regard to that clause of the contract of July the 22nd, 1868, now under consideration, wherein the city agreed that it would not reduce water rates below those charged at the date of the contract, may be summarized thus: The City of Los Angeles, by virtue of the acts of April the 4th, 1850, and March the 11th, 1850, hereinbefore mentioned, which constituted the original charter of said city, was authorized to make said agreement; and, further, if such original authority did not exist, the agreement was validated by the ratifying act of April the 2nd, 1870.

These views render unnecessary the determination of the question of estoppel urged by complainants in their last brief.

II. The next defense to the suit is that there is no proof that the rates fixed by the ordinance of 1897 are less than the rates that were charged by the assignors of the water company at the date of the contract, July the 22nd, 1868.

The evidence adduced on this point consists of a report
171 made in 1870 of a joint committee of the city and water company appointed for the purpose of fixing water rates, which report states, in substance, among other things, that said committee

had established water rates, taking as a guide the rates charged in 1868 and a similar report made in the year 1874, which reports were accepted and approved by the mayor and council of the city of Los Angeles.

Defendants insist that the statements in said reports that the committee had taken as a guide the rates charged in July, 1868, are hearsay declarations of a committee of the council, not binding upon the city, citing 1 Dillon on Municipal Corporations, 4th edition, sec. 237, note on page 321–'2.

I have examined the cases below mentioned, which are among those cited by Judge Dillon in the note referred to, and find that, so far from sustaining, they antagonize defendants' contention. The rule, as I gather it from these cases, is this: A corporation, municipal as well as private, is bound by the declarations of its officers, where such declarations accompany and are explanatory of an act done by the officer in the scope of his authority (Glidden *v.* Unity, 33 N. H., 571; The County of La Salle *v.* William Simmons, 10 Ill., 516; Covington & Lexington R. R. Co. *v.* Ingles, 15 B. Monroe, 637; Gray *v.* Rollingsford, 58 N. H., 253; Toll-bridge Co. *v.* Betsworth, 30 Conn., 380; Grimes *v.* Keene, 52 N. H., 330).

The following extract is from Glidden *v.* Unity, *supra:*

"In all American courts, towns and other corporations are now to be considered as subject to the same presumptions and implications arising from their corporate acts or the acts of their agents, within the scope of their authority, without either vote, deed, or writing, as in the case of natural persons. *Vide* authorities collected in 2 Kent's Com., 290, and Ang. & Am. on Corp., 212. They
172 may be bound by the express promise of their agents or officers, acting within the scope of their authority, or such promise may be implied against the corporation from the acts of its agents within their authority, as in the case of natural persons. 8 Pick., 178; 2 Mason, 31."

In the County of La Salle *v.* Simmons, *supra*, the court says:

"The declarations of the commissioners respecting the payment of the money were not competent evidence against the county. They were not made by them while officially representing the county in this transaction. The declarations of an agent while engaged in the business of his principal, respecting a particular matter then depending, are a part of the *res gestæ* of the transaction and binding on the principal, but those made out of the course of the agency, when the agent is not acting for the principal in the particular transaction concerning which they are made, are mere hearsay and not admissible in evidence against the principal. 1 Greenleaf's Ev., §§ 113–'14; Story on Agency, §§ 134–'35."

In The Covington & Lexington R. R. Co. *v.* Ingles, *supra*, the court said:

"The doctrine is well settled that where the acts of the agent will bind the principal, there his representations and statements respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gesiæ*. Wherever what the agent did is admissible in evidence, then whatever he said on the subject

while doing it is also evidence against the principal. The court, therefore, did not err in admitting this testimony."

The committees above mentioned were in the performance of the duty expressly enjoined upon them by the city, and the
173 statements in their reports that they had followed the rates charged in July, 1868, were explanatory of the rates they established, and therefore said statements are clearly within the rule enunciated by the foregoing authorities. The same remark applies to the actions of the council and mayor in accepting and approving said reports.

Defendants further suggest that it does not appear from said statements whether the time referred to in July, 1868, was prior or subsequent to the 22nd day of that month, the date of the execution of the contract.

This suggestion, I think, is without force. The statement is that the committee established rates, etc., "taking as a guide as near as can be the charges and rates for domestic purposes charged in July, 1868." The obvious meaning of this statement is that the charges and rates therein referred to prevailed, not merely on a particular day in July, but during said month.

I hold that the reports above mentioned and the actions of the city council and mayor thereon show that the rates fixed in said report of 1870 were the rates charged by the assignors of the water company July the 22nd, 1868.

III. The next defense relied on is that complainants are not entitled to a decree annulling the ordinance of 1897, for the reason that complainants have violated and are still violating a material provision of said contract by taking from the Los Angeles river more than ten inches of water, measured under a four-inch pressure, citing Pomeroy's Eq. Jur., secs. 1341 and 1407.

Defendants admit that all the water taken from the river prior to October 20th, 1896, was taken with the consent of the city,
174 as provided in the contract, and it does not appear that a greater quantity was being taken when this suit was commenced, March the 4th, 1897, than was taken in October, 1896, but defendants claim that said consent was withdrawn on the date above mentioned, October the 20th, 1896.

If it be conceded, as claimed by defendants, which, however, I do not decide, that the provision of the contract limiting the quantity of water to be taken from the river without the previous consent of the city is sufficiently certain for enforcement, or, more specifically, that said quantity is ten inches measured under a four-inch pressure, still the consent of the city to the taking of a greater quantity once given cannot be withdrawn during the life of the contract, for the reason that large expenditures have been made by complainants in reliance upon such consent (Rhodes *v.* Otis, 33 Ala. Rep., 600; Woodbury *v.* Parshley, 7 N. H. Rep., 237; Lacy *v.* Arnot *et al.*, 33 Pa. St. Rep., 169; Russell *v.* Hubbard *et al.*, 59 Ill. Rep., 337; 45 Ga. Rep., 33; 4 C. E. Green (N. J.) Rep., 153; Williamston, etc., Co. *v.* Battle, 66 N. H. Rep., 546).

The rule enunciated in the foregoing citations has also been recog-

nized and applied in California (Flickinger *v.* Shaw, 87 Cal., 126; Grimshaw *v.* Belcher, 88 Cal., 217; Smith *v.* Green, 109 Cal., 228).

From the syllabus of the case last cited I quote as follows: "As a general rule, one who rests his claim to an easement on a verbal contract alone, unexecuted and unaccompanied by any other facts, has no rights thereto which he can enforce, yet where a parol license to take half the waters of a stream has been executed and investments have been made upon the faith of it the license is irrevocable" (Smith *v.* Green, 109 Cal., 228).

IV. Defendants further contend that complainants have
175 so acquiesced in the action of the council in the fixing of water rates as to estop them from maintaining the present suit, and also have been guilty of such laches in not sooner seeking an injunction against the infringement of their rights as is fatal to the relief they now seek.

This contention, in my opinion, is not well taken. So far from the action of the city council having been acquiesced in by the defendants, it has been the subject of repeated protests; but, even if the defendants had not protested, their acquiescence in ordinances establishing rates prior to the year 1896 would not be acquiescence in the ordinance of that year, for the obvious reason that the last-named ordinance made a greater reduction of rates than any previous ordinance. Without reference, however, to the facts that the ordinances of 1896 and 1897 made greater reductions than had been made in previous ordinances, it may be stated broadly that acquiescence in an ordinance passed one year cannot be acquiescence in an ordinance passed the succeeding year. The ordinances passed consecutively through a series of years, beginning, for instance, with 1880 and extending down to 1889, were not one continuous act infringing complainants' rights; but each ordinance was a separate and distinct infringement, and therefore acquiescence in one does not estop the defendants from assailing another.

V. Defendants further contend that if the limitation in the contract of July the 22nd, 1868, upon the power of the city to fix water rates be valid the ordinance of 1897 is void upon its face and does not throw any cloud upon complainants' rights under said contract nor expose their property to forfeiture, and therefore complainants have adequate remedies at law by actions for collections of water rates, citing Spring Valley Water
176 Works *v.* Bartlett, mayor, *et al.*, 16 Fed. Rep., 615; Alpers *v.* City and County of San Francisco, 32 Fed. Rep., 503, and Murphy *v.* East Portland *et al.*, 42 Fed. Rep., 308.

This contention is erroneous in its assumption that the ordinance referred to is void upon its face, and, besides, is fully answered by the decision on demurrer in the case of Santa Ana Water Co. *v.* Town of San Buenaventura, *supra*. That case, so far as concerns the question of equitable jurisdiction, is in all essential respects similar to the case at bar. This is not true, however, of any of the three cases cited by defendants in this connection. Moreover, two of said cases, Alpers *v.* City and County of San Francisco, *supra*, and Murphy *v.* East Portland *et al.*, *supra*, so far from supporting, are

in one respect against defendants' contention. They hold, it is true, that the judiciary will not restrain the passage by a municipal corporation of a proposed ordinance upon a matter within the legislative discretion of such corporation, but they at the same time expressly recognize the competency of the courts, after the passage of such an ordinance, to annul or arrest its enforcement if it be unconstitutional.

The case mainly relied on by defendants, however, is that of Spring Valley Water Works *v.* Bartlett, mayor, *et al.*, *supra*, in which the court held that the proposed ordinance, whose adoption was sought to be restrained, if void at all, was void on its face, and that because everybody is presumed to know the law, no injury could result therefrom. The very essence of the rule there enunciated by Judge Sawyer is that the facts which nullify the ordinance must appear from its inspection, the theory being that since the facts appear upon the face of the ordinance and everybody is presumed to know the law applicable to such facts, the ordinance is a proclamation of its own nullity, and therefore cannot, in contemplation of
177 law, be productive of harm. Thus it will be seen that the rule is extremely technical, and Judge Sawyer himself, while enforcing it, as he in effect says, under the constraint of precedents, freely criticizes its severity. In order to justify the application of such a rule, every requirement of it should be fully met.

The reason why the ordinance in Spring Valley Water Works *v.* Bartlett, mayor, *et al.*, *supra*, if void at all, would have been void upon its face, was that the alleged contractual rights which it attempted to divest were granted by an act of the legislature of California—that of April the 22nd, 1858—which act, without pleading or proof, was within the court's knowledge. In the case at bar, however, the ordinance upon its face is valid, and its invalidity appears only when considered in connection with the contract of July the 22nd, 1868, and evidence showing what the water rates were at that date. While the court takes judicial notice of the ratifying act of April 2nd, 1870, still since the provisions of the contract of July the 22nd, 1868, are not embodied in said act, I am not sure that said provisions are matters of judicial knowledge, although such seems to be the ruling of the court, one of the justices dissenting, in Brady *v.* Page, 59 Cal., 52. Conceding, however, that the court will take judicial notice of all the provisions of said contract, still the one in question simply provides that water rates shall not be reduced below the rates then charged, without indicating what those rates were, and therefore the invalidity of the ordinance appears not upon its face, but only in connection with extraneous evidence of what the rates were in July, 1868, and for this reason complainants have adduced that evidence in the present case.

Defendants, in one of their briefs filed on demurrer, discussing the branch of the case now under consideration, say:

178 "The position of complainants' counsel seems to be that merely because they can contemplate the possibility that they are intended to be included within the provisions of the ordinances which are attacked here they can obtain the declaration of this

court that the acts of the council are void, irrespective of the question whether anything is ever done to infringe their rights of property or not.

"In other words, they claim that they are entitled to have the theoretical question of law, concerning the validity of their contract and the invalidity of the ordinance in question, determined by this court merely for their own satisfaction and without showing that any irreparable damage will ensue if the contract is valid and the ordinances are void.

"If the contract is void and the ordinances are valid, the complainants have no equity, and if, on the other hand, the contract is valid and the ordinances are void, then no damage can result to complainants, in contemplation of law, as the city is not doing or attempting to do anything that will in any way interfere with the property of complainants."

These comments do not correctly present the situation as disclosed by the pleadings and proofs. Under the circumstances of this case the ordinance itself is an infringement of complainants' property rights because it hinders them in the collection of that compensation to which they are entitled under the contract of 1868, and it is idle to say that relief cannot be had in equity, because the power and duty of the city ended with the passage of the ordinance, and no effort is now being made by the city for its enforcement. The ordinance, by reason of the severe pains and penalties which apparently fortify it, is daily, hourly, and momentarily enforc-
179 ing itself. The defendants must either submit to the terms of the ordinance or incur unusually onerous expenditures. It is reasonably certain that if, with the ordinance standing, they were to undertake the collection of rates in excess of those prescribed in the ordinance, they would be resisted at every point by the consumers of water, and thus be driven to innumerable actions at law. Besides, should they, in any instance, succeed in collecting, without an action, a higher rate than the ordinance prescribes, it is equally certain that they would thereby bring upon themselves protracted and heavy litigation, having for its object forfeiture of their entire system of works. Surely these injuries are irreparable, and actions at law, so far from being adequate to the exigencies of the situation, are, as complainants, in their brief, forcibly put it, mere mockeries of a remedy.

Defendants further suggest that the equitable relief prayed for by the complainants ought not to be granted, for the reason that a decree annulling the ordinance of 1897 could not become final until affirmed on appeal by a court of last resort, and that before this could take place the year for which the ordinance was passed will have expired.

This suggestion, in my opinion, is without force. If the views which I have already expressed are correct, complainants' rights under the contract of July the 22nd, 1868, cannot be adequately protected in any other way than by an annulment of said ordinance, and the possibility or probability that the enforcement of a decree to that effect may be postponed by an appeal until the ordinance

expires of its own limitation affords no reason for a denial by this court of the relief to which it finds the complainants entitled.

In San Diego Water Company *v.* San Diego, 118 Cal., 556,
180 which was a suit to annul a city ordinance, the trial in the lower court was had after the expiration of the year covered by the ordinance, and although the decision of the supreme court in bank was not rendered until more than six years thereafter, and specially adverts to the date of the trial in the lower court, the case was sent back for a new trial.

My conclusions are that the contract of July the 22nd, 1868, between the city of Los Angeles and the assignors of the water company, in so far as said contract provides that the city shall not reduce water rates below those charged at said date is valid, and that the ordinance of 1897, which was passed pursuant to constitutional and legislative requirements of the State of California, does reduce water rates below the minimum so prescribed, thereby impairing the obligation of said contract, and should be annulled.

A decree conformable to this opinion will be entered.

OLIN WELLBORN, *Judge.*

Endorsed: No. 734. U. S. circuit court, southern district of California. Los Angeles City Water Company *et al.*, complainants, *vs.* The City of Los Angeles *et al.*, defendants. Opinion of the court on final trial. Filed May 31, 1898. Wm. M. Van Dyke, clerk.

181 In the Circuit Court of the United States for the Southern District of California.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants, *vs.* THE CITY OF LOS ANGELES ET AL., Defendants.	No. 734. Stipulation.

It is stipulated between the parties to this action as follows:

I.

That on the 22d day of July, 1868, the instrument set out in paragraph 4 of the bill of complaint herein and alleged by the plaintiffs to be a contract between the City of Los Angeles and J. S. Griffin, P. Beaudry, and Solomon Lazard, with respect to furnishing water to the inhabitants of the city of Los Angeles, and which said instrument bears date the 20th day of July, 1868, was executed by the parties thereto and was signed by the mayor of the city and president of the council under and by virtue of the authority given by an ordinance of said city approved July 22, 1868, and found in the volume of published ordinances of the city of Los Angeles issued in 1878, pages 128–137, and which said ordinance is made a part of this stipulation, and was recorded in the office of the county recorder of Los Angeles county on the 22d day of July, 1868, in

Book I of Miscellaneous Records, pages 428 *et seq.*, which said ordinance is in words and figures following, to wit:

After the title of the ordinance and enacting clause—

SEC. 1. "The contract hereinafter set forth and expressed, for the care, maintenance and improvement of the Los Angeles
182 city water works, wherein the corporation, known as the mayor and common council of the city of Los Angeles and their successors in office, is party of the first part, and John S. Griffin, Prudent Beaudry and Solomon Lazard are parties of the second part, upon the same being signed by C. Aguilar, mayor of said city of Los Angeles, who is hereby authorized, empowered and directed to sign the same for and on behalf of said corporation, known as the mayor and common council of said city of Los Angeles, as party of the first part, and John S. Griffin, Prudent Beaudry and Solomon Lazard, as parties of the second part, shall become valid and binding in all respects upon the parties thereto, said contract being in the words and figures following, to wit:

"JOHN KING, *President.*

"Approved July 22, 1868.

C. AGUILAR, *Mayor.*"

SEC. 2. "This agreement made and entered into this the 20th day of July, A. D. 1868, between the corporation known as the mayor and common council of the city of Los Angeles, and their successors in office, for and on behalf of said City of Los Angeles, party of the first part, and John S. Griffin, Prudent Beaudry, and Solomon Lazard, residents of the city and county of Los Angeles, State of California, party of the second part, witnesseth: That for and in consideration of the yearly payment of one thousand five hundred dollars per annum in gold coin, such payments to be made upon the first day of January of each year, after the signing and approval of this ordinance and contract, until the conclusion of
183 the term of this contract; and the further consideration that the said parties of the second part will surrender to the said party of the first part and cancel all claims they now hold against said city for repairs of said water works, and for damages amounting to the sum of eight thousand dollars, a little more or less; and for the further consideration of the said parties of the second part, shall make the following improvements about, in and upon the said water works, at their own proper costs and expenses, to wit: lay down in streets of said city twelve miles of iron pipes of sufficient capacity to supply the inhabitants of said city with water for domestic purposes, and shall erect or cause to be erected, one hydrant, to be used as a protection against fire, at one corner of each cross-street of said city, where the water pipes are now, or may hereafter be laid, by virtue of this contract, and shall, within one year from the approval of this contract and ordinance, erect, or cause to be erected, an ornamental fountain upon the public plaza of said city, of such design as the mayor and common council shall direct, at a cost not to exceed one thousand dollars; and shall, within two years from the approval of this contract and ordinance, construct,

at their own expense, such ditches, flumes, or erect such machinery in connection with said water works, as will secure to the inhabitants of said city a constant supply of water for domestic purposes, and shall construct reservoirs of sufficient capacity for that purpose. The said party of the first part, for the above considerations, and one dollar in hand paid, the receipt whereof is hereby acknowledged, hereby covenants and agrees with the said party
184 of the second part, their heirs, executors, administrators or assigns, to deliver and concede to the said parties of the second part, their heirs, executors, administrators or assigns, the exclusive use, control, possession and management of the Los Angeles city water works, so called; together with all and singular, the pipes, flumes, wheels and other personal property composing and appertaining to said water works, in any manner whatsoever, with all the rights, easements and privileges, and covenants as described and contained in a certain instrument of lease, executed by the mayor and common council of the said city of Los Angeles, of date October sixteenth, A. D. one thousand eight hundred and sixty-five, to Jean L. Sansevaine, for the period of thirty years from the signing and approval of this contract and ordinance, with the right to sell and distribute water for domestic purposes, and to receive the rents and profits thereof, for their own use and benefit, except as hereinbefore provided, hereby giving and granting the said parties of the second part, their heirs, executors, administrators or assigns, the right to lay pipes in any and all the streets of said city, and to dig and make all necessary excavations for that purpose, and the right of way through, upon and over land or streets belonging to the said city of Los Angeles, with the additional right to take water from the Los Angeles river at a point above or near the present dam; provided, always, that the said parties of the second part, their heirs, executors, administrators or assigns, shall at no time take from said river for the use of said water works more than ten inches of water, without the previous consent of the mayor and common council of said city; and that they will,
185 within sixty days from the date hereof, select the point from which the water will be taken from said river. The said party of the first part hereby covenant and agree with the said parties of the second part, their heirs, executors, administrators or assigns, that at the expiration of the period of thirty years from the execution of this instrument, they will pay to the said parties of the second part, their heirs, executors, administrators or assigns, the value of the improvements made in, about, and upon the said water works, in pursuance of this contract; the same to be ascertained by arbitration, in case the parties cannot agree upon the value thereof, the said party of the first part, and the parties of the second part, their heirs, executors, administrators or assigns, to choose one man each, and the two men thus chosen to select a third man, and the judgment of the three men thus selected shall be final in the premises. And the said party of the first part hereby covenant and agree to make no other lease, sale, contract, grant or franchise to any person or persons, corporation or company, for the sale or delivery of water

to the inhabitants of said city for domestic purposes during the continuance of this contract, always without prejudice to any rights already granted. And the said parties of the second part, their heirs, executors, administrators or assigns, hereby covenant and agree with the said party of the first part, that they will pay the sums of money at the time and in the manner hereinbefore mentioned and set forth, and cancel the claims hereinbefore mentioned, upon the signing and approval of this contract and ordinance by the proper parties thereto; that they will make the improvements herein-
186 before mentioned and set forth, in the following manner, to wit: That they will replace all the wooden pipes now belonging to said water works within one year from the signing and approving of this contract and ordinance, and that they will extend said iron pipes as fast as the citizens, desiring to be supplied with water for domestic purposes, will agree to take sufficient water to pay ten per cent. per annum interest upon the cost of extending such pipes through the streets now unsupplied with water. That they will, within one year from the date hereof, place a hydrant, to be used as a protection against fire, at one corner of one street at each of the cross-streets where the pipes are now laid down, and will erect hydrants at other street corners according to the terms of this contract, as fast as the pipes are extended through the streets of said city. That they will erect, or cause to be erected, an ornamental fountain upon the public plaza, of such designs as the mayor and common council shall direct, within one year from the date hereof; that they will furnish water for the public schools and city hospitals, jails, free of charge, when *then* the same are near the pipes, the city furnishing the necessary conduits for that purpose; that they will make all the improvements herein mentioned and set forth, and keep the same in repair at their own cost and expense, for the said period of thirty years, and return the said water works to the said party of the first part, at the expiration of the said period of thirty years in good order and condition, reasonable wear and the damage of the elements excepted, upon the payment to them of the value of the improvements made after the approval of this contract, to be ascertained as hereinbefore provided, and give a bond in the sum of
187 twenty thousand dollars, conditioned for the compliance by them of the conditions of this contract, to be approved by the mayor of said city; and will pay all State and county taxes assessed upon said water works during the said period of thirty years. Always provided that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water rates, or so fix the price thereof to be less than those now charged by the parties of the second part for water; provided that a certain contract of lease heretofore executed by the mayor and common council of said city to Jean L. Sansevaine, of said water works, of date October sixteenth, A. D. one thousand eight hundred and sixty-five, be surrendered up and canceled at or before the signing of this contract; provided, always, that the rights and privileges by these presents conceded to said

parties of the second part do not embrace, to any extent, or have any reference to, the water works of said city used for the distribution of water for the purposes of irrigation, or affect in any manner any rights of irrigation, either existing at present, or which may exist hereafter, except as to the ten inches of water, as hereinbefore provided. And it is expressly stipulated and covenanted that said parties of the second part shall not dispose of any water for the purpose of irrigation, but shall only take from said river the water necessary for domestic purposes, as above specified.

"In testimony whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

"JOHN KING, *President.*

188 "Approved this 22d day of July, A. D. 1868.

G. AGUILAR, *Mayor.*
JOHN S. GRIFFIN. [SEAL.]
P. BEAUDRY. [SEAL.]
S. LAZARD. [SEAL.]

"Erasure in the fifth and sixth lines of the fourth page; the word 'jails' interlined in the sixth line of the sixth page; the words 'of the improvements made after the approval of this contract,' in the fourteenth line of sixth page; part of twenty-fourth, the twenty-fifth, and part of twenty-sixth lines, sixth page, erased and the words 'to be less than those charged by the said parties of the second part for water' inserted in lieu thereof, all before execution and delivery; the word 'cubic' erased on fourth page.

"In presence of—

CHAS. H. LARRABEE.
JOEL H. TURNER.

"STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

"On this twenty-second day of July, A. D. one thousand eight hundred and sixty-eight, personally appeared before me, Joel H. Turner, a notary public in and for said Los Angeles county, California, C. Augilar, mayor city Los Angeles, California; John S. Griffin, P. Beaudry, and S. Lazard, whose names are subscribed to the annexed instrument as the parties thereto, personally known to me to be the same persons described in and who executed the said annexed instrument as the parties thereto, who each for himself acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

"In witness whereof I have hereunto set my hand and
189 affixed my official seal the day and year in this certificate first above written.

"[SEAL.] JOEL H. TURNER,
Notary Public.

"STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

"C. Aguilar, mayor of the city of Los Angeles, and John King, president of the common council of said city of Los Angeles, being duly sworn, depose and say that as mayor and president of said council they respectively examined the annexed contract and ordinance, and that the words 'and to use unoccupied city lands for the constructing of all necessary reservoirs,' on the fourth page and in the fifth and sixth lines of said page, and the word 'cubic,' in the fourteenth line of said page, and the words 'as the products from the sales of water shall pay less than twelve per cent. per annum on the capital invested,' in the twenty-fourth, twenty-fifth, and twenty-sixth lines on page six, and the word 'cubic,' in the twelfth line on seventh page of said contract and ordinance, were erased before the passage and approval of said contract and ordinance, and that the word 'jails,' in sixth line on sixth page, and the words 'of the improvements made after the approval of this contract,' in fourteenth line on sixth page of said contract, and the words 'to be less than those now charged by the said parties of the second part for water, in the twenty-fourth, -fifth, and twenty-sixth lines of page six*th* of said contract and ordinance, were interlined before the passage and approval of said ordinance and contract.

G. AGUILAR, *Mayor.*
JOHN KING,
President of Common Council.

190 "Sworn to and subscribed before me this 22d day of July, 1868.

"[SEAL.] JOEL H. TURNER,
"*Notary Public.*"

II.

That the contract of lease executed by the mayor and common council of the city of Los Angeles to Jean L. Sansevaine of the water works referred to in the said instrument above set forth was surrendered up and cancelled at or before the execution of the said instrument of July 20, 1868, and in the first paragraph hereof set forth.

III.

That the said J. S. Griffin, P. Beaudry, and Solomon Lazard duly assigned the said instrument and all of their rights thereunder to the plaintiff The Los Angeles City Water Company; which said assignment was recorded June 15, 1869, in Book 13 of Deeds, page 255, records of the county of Los Angeles, and is in words and figures following, to wit:

"This indenture, made the twelfth day of June, in the year of our Lord, one thousand eight hundred and sixty-nine (1869) between John S. Griffin, Solomon Lazard and Prudent Beaudry, all of the city and county of Los Angeles, parties of the first part, and the

'Los Angeles City Water Company' a corporation, formed and existing in the county aforesaid, under the laws of the State of California, located and doing business in said city, party of the second part,

"Witnesseth, that the said parties of the first part, for and in consideration of the sum of three dollars, and divers other good, valuable and sufficient considerations, to them in hand paid
191 by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell, unto the said party of the second part, and to its assigns forever, all those certain lands, tenements, appurtenances, rights, easements and franchises, situate in the city and county of Los Angeles, State of California, contained and included in and conveyed by three certain instruments, recorded in the county recorder's office of said county to wit:

"First. A deed of conveyance from Rafael Carbajal, to the parties of the first part and one Charles Lepaon, dated February 19th, 1868, recorded in Book 9 of 'Deeds,' page 300.

"Second. A deed of conveyance, to the parties of the first part from Thadeus Amat, bishop of Monterey and Los Angeles, dated June 9th, 1868, recorded in Book 10 of 'Deeds' page 95.

"And third. A certain ordinance of said city, approved July 22d, 1868, and contract annexed thereto, between said city and the parties of the first part, dated July 20, 1868, recorded in Book No. 1, of Miscellaneous Records, page 428.

"Reference being hereby made to said instruments and the description and specifications of the lands, appurtenances and rights thereby conveyed, are hereby made the description of the estate and franchises hereby assigned and transferred.

"Together with all and singular the tenements hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in
192 or to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part & its assigns forever. (The words 'heirs and' in 15th and 38th lines being erased.)

"In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

JOHN S. GRIFFIN. [SEAL.]
S. LAZARD. [SEAL.]
P. BEAUDRY. [SEAL.]

"Signed, sealed, and delivered in presence of—
—— ——."

(Duly acknowledged.)

IV.

That the Los Angeles City Water Company took possession of the said water works mentioned in said instrument and pursuant thereto began the laying of pipes in said city to furnish the inhabitants thereof with water, as in the said instrument provided, and did lay down the twelve miles of iron pipe in the city of Los Angeles for the said purpose, and have ever since been extending the pipe system, until there are now about 320 miles of pipe laid in the city of Los Angeles and belonging to the Los Angeles City Water Company and used for the distribution of water for supplying the inhabitants of the city with water for domestic use under said instrument.

V.

That said Los Angeles City Water Company began laying the twelve miles of iron pipe and the erection of the fire-hydrants at one corner of each cross-street of said city immediately after
193 its incorporation, and the same was continued by the said Los Angeles City Water Company, and the twelve miles of pipe were laid and hydrants, to be used as a protection against fire, constructed in pursuance of the said instrument, and ever since the incorporation of the Los Angeles City Water Company it has been extending the pipe system and erecting fire-hydrants in pursuance of the said instrument and under the order of the said city, and at the commencement of this action there were over five hundred hydrants used as a protection against fire in the said city of Los Angeles erected by said Los Angeles City Water Company, and during all of said time the said Los Angeles City Water Company has furnished the city of Los Angeles with water for the extinguishment of fires free of charge.

VI.

That an ornamental fountain upon the public plaza of said city was constructed, as provided in said instrument, by the Los Angeles City Water Company, and reservoirs have been constructed and used in connection with the said water system by the said Los Angeles City Water Company, until there are now in said city six reservoirs constructed by said company, one having a capacity of forty million gallons, another fifteen million gallons, another three and a half million gallons, one of six million gallons, one of three hundred and forty thousand gallons, and one of one million gallons; and said company did within sixty days select the place of diversion of said waters in accordance with said instrument, and began the diversion of the water at the place so selected, and did replace all the wooden pipes referred to in said instrument, and has extended said iron pipes as fast as the citizens desiring to be
194 supplied with water for domestic purposes would agree to take sufficient water to pay ten per cent. per annum interest upon the cost of extending such pipes through the streets then unsupplied with water.

VII.

That the said Los Angeles City Water Company has been ever since the execution of said instrument and assignment furnishing water to the city of Los Angeles for the public schools, city hospitals, and jails therein free of charge.

VIII.

That the said Los Angeles City Water Company and its predecessors paid to the said city of Los Angeles the rent provided in the said instrument, to wit, fifteen hundred dollars per annum, until the 2d day of December, 1870, when the city of Los Angeles passed and published an ordinance accepting a proposition made by the Los Angeles City Water Company, and which said ordinance was published in the said volume, 1878, of published ordinances, at pages 137, 138, and of which the following is a copy:

"The proposition of the Los Angeles City Water Company, this day made, to remove the reservoir now being on the public plaza, and convey to the city of Los Angeles all its right, title, and interest to said plaza, and lay off the same into suitable walks and ornamental grounds, and to erect a fountain thereon after such design as may be furnished by the mayor and common council of said city, at an expense not to exceed one thousand dollars, and surrender all scrip now held by said water company against the 'city water works fund,' upon the conditions and for the considerations
195 herein provided, is hereby accepted; provided, all the said works shall be done, performed, and completed within ninety days after the furnishing of the design for said ornamental fountain by the said mayor and common council.

"Upon the compliance with section one of this ordinance by the Los Angeles City Water Company, at the time and in the manner therein specified, the amount of rent agreed to be paid by the said water company to said city, as provided in a certain contract and ordinance passed July 20th, 1868, and approved July 22d, 1868, shall be, and the same is hereby reduced to the sum of four hundred dollars per annum, which said sum shall be paid in the manner and at the time specified in said contract and ordinance, and shall be received in full payment for all rents due and to grow due from said water company to said city for the uses and privileges given and granted by said ordinance; and the performance of all the provisions of section one hereof within the time and manner specified by the said water company is accepted and shall be received as a full consideration and payment of the rent hereby remitted, which is declared to be all rent in excess of the sum of four hundred dollars per annum, for and during the full period of said contract and franchise.

"An ordinance entitled 'An ordinance contracting for the care, maintenance, and improvement of the city water works,' passed July 20th, 1868, and approved July 22d, 1868, is hereby amended so as to comply with and conform to the provisions of this ordinance.

"Approved December 2d, 1870."

196 And the said ordinance was accepted by the said Los Angeles City Water Company and its terms complied with, and since that time it has paid to the city of Los Angeles the sum of four hundred dollars per annum rent pursuant thereto.

IX.

That the extension of the said system and the obtaining of an increased quantity of water was at all times, when said increase was made, necessary to supply the inhabitants of the city of Los Angeles with water for domestic use, and to furnish the city with water for extinguishing fires, and for all purposes mentioned in said instrument; and the said company has, in meeting the wants of the city, among other things, purchased the system that was established by P. Beaudry, and which was known as the Beaudry system of water works, and also certain water rights in the Arroyo Seco, and conducted water from the Arroyo Seco into the city on the east side of the Los Angeles river, and has been furnishing the inhabitants of that portion of the city with water from said system, and also acquired the stock of the corporation known as the East Side Spring Water Company, the same mentioned in paragraph 10 of the complaint.

X.

That the defendants in this action waive all questions as to the proper joinder of S. G. Murphy and the Crystal Springs Land & Water Company with the Los Angeles City Water Company as plaintiffs and the introduction of any evidence under the allegations made as to the character and sources of the waters in the excavations made by the Crystal Springs Land & Water Com-
197 pany and alleged in the said bill of complaint, and it is stipulated that any decree that may be entered in this cause shall neither be conclusive upon the title to either party to the lands, rights of way, waters, and water rights and easements of all descriptions mentioned in the bill of complaint herein, nor shall the decree be admissible in evidence in any other litigation between the plaintiffs and the defendants or any of them upon the question of title to the said properties, and the decree which may be entered herein shall contain a clause making such reservation.

Such decree shall not, nor shall anything contained in this stipulation, be construed as binding or concluding any of the parties hereto in regard to any fact or matter except in regard to the validity of the contract set forth in the bill of complaint and in regard to the relief expressly awarded by such decree, and said decree shall contain a provision to this effect.

This stipulation does not deprive either party of the right of appeal.

XI.

That in the growth of the city the settlement thereof extended to localities of higher elevation than those occupied by the inhabitants of the city at the time of the execution of said agreement, and the

point selected originally for the diversion of the waters of the Los Angeles river for supplying the city and its inhabitants, as in the instrument provided, was so located in said river that it was impracticable to there maintain dams and diversion works that would not occasionally be swept away or rendered useless by floods, and the surface water of the river after severe storms became muddy and unfit for supplying the inhabitants with water for
198 domestic uses, and in the year 1889 the Crystal Springs Land & Water Company made excavations in the places referred to in the bill of complaint and laid pipes therein, as alleged, and that the water that has been used by the Los Angeles City Water Company for supplying the city and its inhabitants with water, as provided in the said instrument, has ever since been obtained from that source, except that from time to time a further supply of water has been taken from the Los Angeles river in order to adequately supply said inhabitants, and which diversions have been at or near the place where the said underground pipes are laid, and that by these means the water can be delivered to higher elevations, and the underground waters, as to quality and amount, are thus protected against the influences of floods.

But it is understood and agreed that nothing in this stipulation contained is to be construed as an admission on the part of the defendants or either or any of them of any title to said waters collected in the said underground pipes in the plaintiffs or either or any of them, but what are the rights of the parties to this suit with respect thereto is one of the questions reserved from the operation of any decree entered herein.

XII.

That the said Los Angeles City Water Company ever since its incorporation has taken more than ten inches of water, measured under a four-inch pressure, from the Los Angeles river, and the amount taken has increased with the increase of population of the city and the demands of the municipality itself for water for extinguishing fires and the other public uses referred to in the
199 said contract, and the amount has increased until now it requires from one thousand to one thousand five hundred inches of water, measured under a four-inch pressure, for such purposes, and during the summer season the amount of water used by the Los Angeles City Water Company for the purposes aforesaid runs from a thousand to fifteen hundred inches, under a four-inch pressure, inclusive of the water obtained by the underground excavations, which latter furnished from 650 to 690 inches, measured under a four-inch pressure.

That to supply the domestic wants of the people of the city of Los Angeles requires one inch of water, measured under a four-inch pressure, to every one hundred inhabitants.

And the population of said city has increased until it now amounts to about 103,000.

XIII.

That ever since the execution of the said instrument bearing date the 20th of July, 1868, the said Los Angeles City Water Company has made the said improvements and extensions and maintained the same at its own expense.

XIV.

That the bond provided for in the said instrument was given and approved as therein required, and the said parties have paid all State and county taxes assessed upon the said water works.

XV.

That on the 7th of April, 1870, Mr. Chapman, on behalf of the Los Angeles City Water Company, stated to the council that at the last session of the council the company was notified to meet the council and fix the water rates, and the company asked the
200 council to appoint two persons as a committee to meet a committee of two from the water company to fix the rates for water, and upon motion it was ordered to appoint a committee of two; whereupon Messrs. Workman and Caswell were duly appointed members of such committee on behalf of said city of Los Angeles; which communication and the order appointing said committee are entered in the records of the common council of the city of Los Angeles, in vol. 7, page 91:

"Mr. Chapman, on behalf of the Los Angeles City Water Work-Company, stated that at the last session of the council the company was notified to meet the council to fix the water rates. The company asks the council to appoint two persons as a committee to meet a committee of two from the water company to fix the rates for water.

"On motion, it was ordered to appoint a committee of 2. Whereupon the president appointed Messrs. Workman and Morris as such committee.

"On motion of Mr. Boyle, Mr. Caswell was substituted on the committee instead of Mr. Morris."

XVI.

That on April 14th, 1870, the said Workman and Caswell, on behalf of the City of Los Angeles, and S. H. Mott and John G. Downey, on behalf of the Los Angeles City Water Company, made a report to the council; which report was accepted by the said common council of the city of Los Angeles, and approved on the 19th day of April, A. D. 1870, by the mayor, and which said report is entered in vol. 7 of the city archives, at page 92, and of which report the following is a copy:

"To the honorable the mayor and common council of the
201 city of Los Angeles and the Los Angeles City Water Company:

"The undersigned, commissioners duly appointed on behalf of your honorable bodies to adjust, fix, and establish the rates and charges of the Los Angeles City Water Company (a corporation duly incorporated under the laws of the State of California for the purpose of supplying the inhabitants of Los Angeles city with pure, fresh water), respectfully report that they have established water rates and charges for domestic purposes, taking as a guide as near as can be the charges and rates for domestic purposes charged in July, 1868; that your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows, to wit:

"SECTION 1.	For tenements occupied by a single family of not more than five persons.....	$2.00
	"For each additional person.....	.25
"SECTION 2.	Bathing-tubs in private houses (for each tub)	1.00
	"In public houses, boarding-houses, bathing establishments, barber shops (for each tub).....	1.00
"SECTION 3.	Bakeries according to the monthly use of flour for each twenty-five barrels.....	2.00
"SECTION 4.	Boarding schools in addition to the rate for private families, for each scholar.....	.20
"SECTION 5.	Building purposes by special contract (for each barrel of lime).....	0.20
"SECTION 6.	Fountains, by special contract only and in no case will be permitted on premises where water is not taken for other purposes, and if water be allowed to flow into other premises where it may be used for
202	other purposes, supply will be stopped, and the amount of payment forfeited.	
"SECTION 7.	Horses, private, including water for washing carriages for one horse.....	0.25
	"Omnibus, stage, stable, each horse.....	0.50
	"Truckmen's carts and saddle-horses.....	0.50
	"Provided that in no case shall any stable be charged less than.....	2.00
"SECTION 8.	Horse troughs, for each trough on sidewalk.....	$5.00 to 10.00
"SECTION 9.	Hose on premises not having a front of more than 25 feet, for the right to attach a hose not exceeding three-fourths of an inch orifice, for washing sidewalks and sprinkling the street, in addition to the charges for other uses.....	1.00
	"Premises above twenty-five feet front in proportion.	

"SECTION 10. Hotels, taverns, and boarding-houses, not including water for baths or for uses without the house, for each bed for boarders and lodgers within the same, in addition to the rate for private families 0.25

"For each day boarder 0.20

"SECTION 11. Lodging-houses, in addition to rate of family keeping the house, for accommodation for each person within the same..... ... 0.20

"SECTION 12. Gardens—sprinkling gardens and grounds, not more than 100 square yards area... 1.00

"Above this area, for every one hundred square yards will be charged..... .. 0.12½

"SECTION 13. Porter-houses, groceries, refectories, etc., shall be charged at the discretion of the water register..... ..... $2.00 to 10.

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"SECTION 14. Printing offices at discretion of the water register.

"SECTION 15. Railroad corporations, rate subject to special agreement in accordance to the quantity of water used.

"SECTION 16. Steam-engines, according to the quantity used at the discretion of the water register.

"SECTION 17. Stores, offices, warehouses and tenements not included in any other classification and requiring only an ordinary amount of water, at the discretion of the water register, not less than..... 2.00

"SECTION 18. Water-closet—for each water-closet, public.. 2.00

"Water-closet—for each water-closet, private. 1.00

"SECTION 19. For large quantities of water, when the quantity used does not exceed 15,000 gallons per month there shall be charged for each 1,000 gallons consumed, as ascertained by meter or otherwise..... 1.25

"When the quantity is over 15,000 gallons per month, for each 1,000 gallons..... 1.00

"For water used for manufacturing and mechanical purposes under 10,000 gallons per month..... ..... 1.00

"Above 10,000 gallons per month, per 1,000. 0.75

"SECTION 20. The board of trustees shall have power in all cases to ascertain by meters, or otherwise, the quantity of water used by any consumer, and to establish a rate for that consumer in accordance with the quantity so ascertained, instead of the special rate given above.

"SECTION 21. For water required for purposes which are not specified in the above tariff, the rate shall be fixed by the water register.

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"SECTION 22. The company will insert the tap and introduce the service to the curbstone by their authorized tapper for..... .... 12.00

"The pipe and fittings remain the property of the company.

"SECTION 23. All water rates payable monthly in advance.

"SECTION 24. The water register will, upon personal examination of the premises of any applicant for water, fix upon its rate, his decision being subject to modification by the board of trustees.

"SECTION 25. Payments will not be received for a less period than one month. Applicants for water at any time after the first day of any month shall pay their rate to the end of the following month.

"That all of said rates are payable monthly in advance in U. S. gold or silver coin.

"Which report we have made and signed in duplicate, and deposited one copy with the secretary of the mayor and common council of Los Angeles city and one copy with the secretary of the Los Angeles City Water Company.

"All of which is respectfully submitted this Los Angeles city this 13th day of April, A. D. 1870.

"E. H. WORKMAN,
"S. B. CASWELL,
"*Committee on Behalf of the City of Los Angeles.*
"S. H. MOTT,
"JOHN G. DOWNEY,
"*Committee on Behalf of the Los Angeles City Water Company.*

205 "The above report having been accepted by the common council is hereby approved by me this 19th day of April, A. D. 1870.

"JOEL H. TURNER, *Mayor.*

"Filed this 13th day of April, 1870.

"M. KREMER,
"*Clerk of Common Council.*

"Council Records, vol. 7, p. 92, session of April 14th, 1870."

XVII.

That on June 8, 1871, the council of the city of Los Angeles appointed another committee, consisting of Messrs. Dockweiler and Osborn, who, in conjunction with a committee of two appointed by the Los Angeles City Water Company, were appointed to fix water rates, and they made a report; which report is as follows:

"To the honorable the mayor and common council of the city of Los Angeles and the Los Angeles City Water Company, a corpora-

tion duly incorporated under the laws of the State of California, for the purpose of supplying the inhabitants of Los Angeles city with pure, fresh water, — respectfully report—

"That we have established and confirmed the rates for domestic and other purposes, as established by the water commissioners of date April 13, 1870.

"All of which is respectfully submitted this 5th day of July, A. D. 1871.

JOHN OSBORN,
HENRY DOCKWEILER,
Committee in Behalf of the City of Los Angeles.
S. H. MOTT,
S. LAZARD,
205½ *Committee in Behalf of the Los Angeles City Water Company.*"

XVIII.

That at the session of the council held August 20, 1874, the following ordinance was passed and became an ordinance of the said city September 20, 1874, and of which said ordinance the following is a copy:

"An ordinance to establish regulation of water rates furnished the inhabitants of this city by the Los Angeles City Water Company.

"The mayor and common council of the city of Los Angeles do ordain as follows:

"SECTION 1. By virtue of the authority vested in and retained by the mayor and common council of the city of Los Angeles by law and by the provisions of the contract and agreement made and entered into between said municipal corporation, as party of the first part, and John S. Griffin, Prudent Beaudry and Solomon Lazard, and their assigns, of the second part.

"Said contract dated 20th of July, 1868, and approved July 22d, 1868. It satisfactorily appearing that the above-mentioned parties of the second part have duly assigned their rights and privileges under said contract to the Los Angeles City Water Company, the following schedule is adopted and established as the water rates to be charged by said water company.

"SEC. 2. The water rates and charges above referred to and hereby established are as follows, to wit:

Schedule of Water Rates.

For tenements occupied by a single family of not more than five persons	$2.00
For each additional person	.25
Bathing-tubs in private houses, for each tub	1.00
In public houses, boarding-houses, bathing establishments, barber shops, on each tub	3.00
206 Bakeries, according to the monthly use of flour, for each twenty-five barrels	2.00

Boarding schools, in addition to the rate of private families, for each scholar..... .20

Building purposes, by special contract for each barrel of lime..... .20

Fountains, by special contract only, and in no case will be permitted on premises where water is not taken for other purposes, and if water be allowed to flow into other premises where it may be used for other purposes, supply will be stopped and the amount of payment forfeited.

Private horses, including water for washing carriages, for one horse..... .25

Omnibuses, stage, stable, each horse..... .50

Truckmen's cart and saddle horses..... .50

Provided that in no case shall any stable be charged less than..... 2.00

For each horse trough on sidewalk ..... 5.00 to 10.00

Hose on premises not having a front of more than twenty-five feet, and for the right to attach a hose not exceeding three-fourths of an inch orifice for washing sidewalk and sprinkling the street, in addition to the charges for other uses..... 1.00

Premises above twenty feet front in proportion.

Hotels, taverns and boarding-houses, not including water for baths or for uses without the house, for each bed for boarders or lodgers, within the same, in addition to the rate for private families..... .25

For each day boarder..... .20

207 Lodging-houses, in addition to rate of family keeping the house for accommodation, for each person within the same..... .20

Sprinkling gardens and grounds, not more than 100 square yards area..... 1.00

Above this area, for every 100 square yards shall be charged 12½ cents.

Porter-houses, groceries, refectories, &c., shall be charged at the discretion of the water register ..... 2.00 to 10.00

Printing offices, at the discretion of the water register.

Railroad corporations, rate subject to special agreement, in accordance to the quantity of water used; steam-engines according to the quantity used, at the discretion of the water register.

Stores, offices, warehouses and tenements not included in any other classification, and requiring only an ordinary amount of water, at the discretion of the water register, not less than..... 2.00

For each public water-closet..... 2.00

For each private " 1.00

For large quantities of water, when the quantity used does not exceed 15,000 gallons per month, there shall be charged for each 1,000 gallons consumed, as ascertained by meter or otherwise..... 1.25

When the quantity is over 15,000 gallons per month, for each 1,000 gallons..... 1.00

For water used for manufacturing or mechanical purposes, under 10,000 gallons per month 1.00

Above 10,000 gallons per month, per 1,000 gallons. .75

208 The board of trustees shall have power in all cases to ascertain, by meters or otherwise, the quantity of water used by any consumer, in accordance with the quantity so ascertained, instead of the special rate given above.

For water required for purposes which are not specified in the above tariff, the rate shall be fixed by the water register.

The company will insert the tap and introduce the service pipe to the curbstone, by their authorized tapper, for... 12.00

"The pipes and fittings remaining the property of the company.

"All water rates payable monthly in advance.

"The water register will, upon personal examination of the premises of any applicant for water, fix upon its rate, his decision being subject to modification by the board of trustees.

"Payments will not be received for a less period than one month.

"Applicants for water at any time after the first day of any month shall pay their rate to the end of the following month.

"That all of said rates are payable monthly in advance, in U. S. gold coin, or silver coin.

"This ordinance shall take effect and be in force from and after its passage, approval and publication, and all ordinances or parts of the same in conflict with this ordinance, shall be, and the same are hereby repealed.

"Passed, session Aug. 20th, 1874.

"Presented to Mayor Toberman for approval August 21st, 1874, and not being returned within ten days thereafter, took effect as if approved, September 2d, 1874.

"M. KREMER, *City Clerk.*

"Published Sept. 20th, 1874."

209 Said ordinance is contained in the volume of ordinances issued by authority of the city of Los Angeles in 1878, and is at pages 238–242 thereof.

XIX.

That on the 8th day of March, 1877, a resolution of said city of Los Angeles was duly passed by the council and published March 13th, 1877, and set out in the volume of ordinances issued by said city in 1878, at pages 450–'1, by which all persons were prohibited from obstructing or causing to be obstructed any public street, and, among other things, prohibiting any person from polluting or causing to be polluted any of the canals or aqueducts of the city, or herding or pasturing any cattle, horses, or hogs or any other animals, or allowing them to be or remain near the reservoir or canal

of the Los Angeles City Water Company in such a manner as to interfere with the purity of said water, or to herd, pasture, feed, or keep any animal on the hillside near or by the canal or reservoir of said company by which any impurity could be carried so as to mingle with or in any manner affect the water of said company.

XX.

That the legislature of the State of California passed an act, approved April 2, 1870, entitled "An act to ratify certain acts and ordinances of the mayor and common council of the city of Los Angeles," which act is published in the statutes of the State of California of 1869–'70, at pages 635–'6, copy of which said act is as follows:

"The People of the State of California, represented in senate and assembly, do enact as follows:

"SECTION 1. The following acts, contracts and ordinances of the mayor and common council of the city of Los Angeles are hereby ratified and confirmed: The contract and lease for the care and maintenance of the Los Angeles City water works, entered into and made between the mayor and common council of the city of Los Angeles, on the one part, and John S. Griffin, Prudent Beaudry and Solomon Lazard, on the other part, dated the twentieth (20th) day of July, eighteen hundred and sixty-eight (1868); and also the ordinance confirmatory of the same, passed July the twenty-second (22d), eighteen hundred and sixty-eight, which contract and ordinance are recorded in the office of the county recorder of Los Angeles county, in Book One of Miscellaneous Records, pages four hundred and twenty-eight (428) to four hundred and thirty-one (431); and also two certain concessions from the said corporation to William G. Dryden, his heirs and assigns, concerning rights of way and water; and the ordinances authorizing the same, passed February twenty-fourth, eighteen hundred and fifty-seven, and December the eighth, eighteen hundred and fifty-seven, respectively, and recorded in the aforesaid recorder's office, in Book Two of Deeds, etc., pages four hundred and fifty-three (453) and four hundred and forty-nine (449), respectively; and a certain conveyance to Hiram McLaughlin, his heirs and assigns, from said corporation, dated August sixth, eighteen hundred and fifty-eight, and recorded in said office in Book Number Four of Deeds, pages two hundred and twenty-five (225) and two hundred and twenty-six (226).

"SEC. 2. This act shall be in force from and after its passage."

XXI.

That the legislature of the State of California passed an act, which was approved April 2, 1870, and published in the Statutes of the State of California, 1869–'70, page 645, entitled "An act concerning water-courses in the city of Los Angeles," by the first section of which certain zanjas were declared public zanjas, and containing,

among other things, the following proviso: "Provided always, that nothing herein contained shall be so construed as to affect or in any manner interfere with any rights, privileges, or easements heretofore granted and conceded to P. Beaudry, John S. Griffin, Solomon Lazard, their associates or assigns, by the mayor and common council of the city of Los Angeles.

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XXII.

That the legislature of the State of California passed an act to amend the charter of the city of Los Angeles, approved April 1, 1876, published in the Statutes of California, 1875–'6, at page 693, and in the first section of the second article it was declared that there was thereby granted to said municipality, to be by it held and enjoyed in absolute ownership, the full, free, and exclusive right to all of the water flowing in the River Los Angeles at any point from its source or sources to the intersection of said river with the southern boundary of said city; also the right to develop, economize, use, and utilize all waters flowing beneath the surface in the bed of said river; and in the said section there was excepted and reserved from the operation of the said grant of the water all vested private rights to the water flowing upon the surface or beneath it in the bed of said river.

XXIII.

That the legislature of the State of California passed an act entitled "An act to amend the charter of the city of Los Angeles," which was approved February 20, 1872, and found in the Statutes of California for 1871–'2, at page 129, and in the second section of which it was enacted that the mayor and common council of the city of Los Angeles should have full and complete control and power over all zanjas, water-courses, water ditches, and canals within the city limits, excepting the rights, privileges, and franchises heretofore granted and then enjoyed by the Los Angeles City Water Company.

XXIV.

That the legislature of the State of California passed an act entitled "An act to amend the charter of the city of Los Angeles," etc., approved March 26th, 1874, found in the Statutes of California for 1873–'4, at page 659, the 28th section of which is as follows:

"SEC. 28. All acts of the legislature relating to the said city of Los Angeles, and all city ordinances heretofore passed, and
212 now in force, and not inconsistent therewith, shall be and remain in full force after this act takes effect, and thereafter until repealed by the proper authority; and all rights vested or liabilities incurred under any former act of the legislature applicable to said city, or any city ordinance, when this takes effect, shall not thereby be lost, impaired or discharged."

XXV.

That the legislature of the State of California passed an act, which was approved March 30, 1878, and found in the Statutes of Califor-

nia for 1877–'8, on page 849, and entitled "An act to ratify certain contracts and ordinances of the council of the city of Los Angeles," the first section of which is as follows:

"SECTION 1. The council of the city of Los Angeles is hereby empowered to contract for the proper sprinkling of the streets of said city, or for the supply of water for such purposes, either with the Los Angeles City Water Company, or any other party, and is empowered to provide for the payment of any compensation agreed, or to be agreed to be paid for such service, in the same manner that any other expenses on the part of said city is or shall be provided for."

XXVI.

That an ordinance was passed by the council and approved by the mayor of the city of Los Angeles on June 6, 1879, and which ordinance is numbered 9, and was published the same date, and found in the compilation so published in 1884, at page 24.

That by said ordinance all persons were prohibited from interfering with the free flow of the Los Angeles river and in any way diverting it without permission of said council, and a provision was contained in said ordinance providing for the punishment of its violation as a misdemeanor.

XXVII.

That on the 12th day of June, 1879, there was approved, and on the 14th of the same month published, another ordinance of
213 the city, published in the same volume, at page 25, of the same character.

XXVIII.

That on the 9th of August, 1887, a resolution was passed by the mayor and council of the city of Los Angeles, and which was published August 11, 1887, and is numbered 572, found in volume of ordinances published in 1889, page 255, by which it was resolved that there existed a necessity for the erection of one hydrant for protection against fire at eleven different points in said city, specified in said ordinance, the second section of which is as follows:

"SEC. 2. That the Los Angeles City Water Company, a corporation, as the successor and assignee of John S. Griffin, Prudent Beaudry and Solomon Lazard, are hereby ordered to erect or cause to be erected one fire-hydrant for protection against fire at one corner of each of the cross-streets hereinafter named, that is to say: at one corner of each of the intersection of corners specified in section 1 of this resolution as provided by agreement approved July 22, 1868."

XXIX.

That on the 13th of August, 1874, a committee, consisting of two members appointed by the council of said city and two members appointed by the Los Angeles City Water Company, presented to the council a report; which report was duly adopted, and of which said report and the action of the council thereon, as entered in

vol. 9 of the Records of the City of Los Angeles, page 33, the following is a copy:

"The committee heretofore appointed for regulating and fixing the rates of water to be charged by the Los Angeles City Water Company, reported that they have established water rates and charges for domestic purposes, taking as a guide, as near as can be, the charged and rates for domestic purposes charged in July,
214 1868. The committee also fixed the rates and charges for other reasonable objects and purposes. They submitted a scale of prices for the different objects. Mr. Gerkins moved that the report be received and adopted as read. Carried.

"Mr. Huber moved that a committee be appointed, who, in conjunction with the city attorney, be instructed to draft an ordinance embodying the prices as fixed in the report of the above committee appointed for that purpose. Carried. Whereupon the president appointed Messrs. Huber, Gerkins, and Mascarel as said committee."

And the rates were established in accordance with the said report and with the same schedule hereinbefore set forth.

XXX.

That on February 17, 1896, the fire commissioners of the city of Los Angeles made a report to the council, and the council acted thereupon, and the following is a copy of the said report and action of the council as entered in the City Records, vol. 45, page 607:

"The fire commissioners reported: First, at a meeting of the board of fire commissioners held this day I was directed to call attention to the fact that the city water company is now putting in water mains on South Hope and South Flower, and request that you order fire-hydrants placed at the intersection of said streets with Ninth, Twelfth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, and Washington.

"Which report was adopted."

And on February 17, 1896, as appears from vol. 45, page 617, the following proceeding was had:

"Mr. Pessell moves that the Los Angeles City Water Company be directed to lay a four-inch main on Santee street between Ninth street and Twenty-third street, where there is not already a four-inch pipe laid, and place fire-hydrants at every other intersection on said Santee street.

"Which motion was adopted."

And on February 24, 1896, as appears on page 652, the following proceeding was had:

215 "Mr. Kingery moves that the city clerk notify the water company to repair the fire-hydrant at the corner of Pico and Pearl streets.

"Which motion was adopted."

XXXI.

That on February 23, 1897, the following proceeding was had by the city council of Los Angeles city, as appears in vol. 48, page 500, of the Council Records:

"The fire and water committee reported:

"Recommend that petition number 139, from R. Zellner *et al.*, asking that a fire-hydrant be placed on the corner of Oak and Washington streets, be granted, and the Los Angeles City Water Company instructed to erect said hydrant.

"Which report was adopted."

Same page and session:

"The water supply committee reported: You committee on water supply, to whom was referred the matter of fixing water rates for the year commencing July 1st, 1897, and ending June 30th, 1898, beg leave to report as follows:"

(Committee comment upon the difficulty of fixing on rates satisfactory to all concerned, etc., etc.)

"We recommend that the accompanying ordinance be placed upon its passage. Draft of an ordinance of the mayor and council of the city of Los Angeles was read, regulating the rates and compensation allowed to be collected by any person or corporation supplying water for domestic and private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1, 1897, and ending June 30, 1890."

Same session, page 532:

"Mr. Toll moves that the Los Angeles Water Company be instructed to lay four-inch pipes on West Adams, Twenty-ninth, and Jefferson streets from Hoover street to Vermont avenue.

"Which motion was adopted."

216 Same session, page 532:

"Mr. Silver moves that the City Water Company be instructed to lay a four-inch main on Moore street from Ninth to Lincoln, and to place a fire-hydrant at the corner of Moore and Lincoln streets.

"Which motion was adopted."

XXXII.

That the council of the city of Los Angeles, since and including the year 1889, has in February of each year passed ordinances fixing the rates to be charged by all corporations and persons within the city of Los Angeles supplying water to the inhabitants thereof, to be in force for one year from and including July 1st; which rates have been less than the rates charged in 1870, as contained in the ordinances hereinbefore set forth, and the Los Angeles City Water Company has collected the rates thus fixed by the city of Los Angeles and no more; but in the year 1896 the council of the city of Los Angeles passed an ordinance fixing the rates to be charged for water for the year commencing July 1, 1896, and ending July 1, 1897, at less than they had ever been fixed before, *ad* and a suit was then brought by the plaintiffs herein in this court against the city of Los Angeles to set aside the said ordinance, and in February of 1897 the city of Los Angeles passed an ordinance which is assailed in this suit and making a still further reduction in the rates.

That the said action of the Los Angeles City Water Company in

collecting the rates fixed by the said several ordinances constitute the only acquiescence of said company (if it be an acquiescence) in the action of the said council.

XXXIII.

That if the rates so established by the council in 1870, and confirmed by the ordinances of the city hereinbefore set forth, were collected for the year beginning July 1, 1897, and ending June 30, 1898, the revenues received by the Los Angeles City Water
217 Company from said rates would be more than fifty thousand dollars in excess of the amount which would be received under the rates named in the ordinances of February, 1897, as set forth in the bill herein.

XXXIV.

That the Crystal Springs Land & Water Company was organized in the year 1886 by the stockholders of the Los Angeles City Water Company, and the said stockholders subscribed and took the stock of the said Crystal Springs Land & Water Company in the same proportion that they held stock in the Los Angeles City Water Company, and though there have been some variations from time to time, the said stock of both companies is held now by the stockholders in the same proportions in each company.

XXXV.

That whatever interest the Crystal Springs Land & Water Company has in a large portion of the property claimed by it was conveyed to it by the Los Angeles City Water Company, but since the organization of said Crystal Springs Land & Water Company and since the conveyances aforesaid the Crystal Springs Land & Water Company has acquired other tracts of land in the Rancho San Rafael and other lands and rights of way in the Los Feliz Rancho which never did belong to the Los Angeles City Water Company.

XXXVI.

The city attorney of the city of Los Angeles did, at a regular meeting of the council of the city of Los Angeles held on the 17th day of August, 1896, make the following report:

218 *Council Proceedings.*

Regular meeting of the council of the city of Los Angeles, held August 17, 1896.

The city attorney reported:

I have for some weeks had under consideration the question of the passage of a resolution by the city council affirming the right of the city to all the waters of the Los Angeles river and asserting its title to the same. Such a resolution will impart notice to the

world of the city's claim, and no person or corporation will hereafter be able to say that they have proceeded with the diversion or use of any of these waters with any such consent of the city as might be implied from its silence on the subject.

The constant attempts that are being made from time to time to acquire rights in these waters make it necessary that we should leave no steps untaken to protect this the city's most valuable possession.

The constantly increasing value of this water makes its protection more necessary and for the same reason more difficult. Had such a declaration been made and maintained during the earlier years of the city's existence much expensive litigation might have been avoided.

We are entering upon a critical period in the history of the city's water supply and the passage of this resolution can do no harm and may be of inestimable benefit.

Permit me to say, in closing, that I have presented this resolution with the express approbation of Messrs. Lee & Scott, the city's special council.

219 I advise its adoption and publication.

Referred to the water supply committee.

The water supply committee reported:

Your committee on water supply have during the past week conferred with the city attorney with reference to the passage of a resolution confirming the rights of the city in the waters of the Los Angeles river, and would recommend the passage of a resolution to that effect, which will be presented by the city attorney.

Which report was adopted.

(See Book 47, page 123–'4, Council Records.)

220 At a regular meeting of the council of the city of Los Angeles, October 19, 1896.

The city attorney reported, and the council acted, and the following is a copy of the report and the action of the council:

I present herewith and ask you to adopt a resolution with reference to the taking of water by the City Water Company and authorizing me to make certain demands upon them and to bring an action as in the said resolution described. This resolution was prepared by Messrs. Lee & Scott and myself after mature deliberation and with the special view of litigation now pending and to be instituted.

We regard your immediate passage of this resolution as important.

Which resolution was as follows:

Resolved, That from this date and including the 22nd day of July, 1898, or until the further order of this council, the Los Angeles City Water Company, and all other persons and corporations taking the water hereinafter mentioned for the purpose of distributing or selling the same in the city of Los Angeles, be required to pay to the city of Los Angeles an amount of money equal to 40 % of the gross rates received from the consumers of said water as rental for the water now passing through what is known as the gate-house of said company located on the Rancho Los Feliz near and on the west side

of the Los Angeles river, and all other water taken from the Los Angeles river by said company, person, or corporations on said Rancho Los Feliz and brought down into said city for supplying the inhabitants thereof with water for domestic use (including watering of grass plots and gardens and supplying water for manufacturing, building, and trade purposes, but not including water used for sprinkling streets, extinguishing fires, flushing sewers, watering parks, supplying schools and municipal buildings, and for
221 other municipal purposes, and also excepting ten inches of said water, measured under a four-inch pressure), said rental to be paid to said city at the end of every three months during said period.

Resolved further, That said Los Angeles City Water Company and said other persons and corporations taking said water as hereinbefore mentioned be required before the 21st of October, 1896, to attorn to the city of Los Angeles as tenant of said city for all the water hereinbefore mentioned (said water being in part all the water mentioned in the bill of complaint on file in the suit of Crystal Springs Land and Water Company and S. G. Murphy, trustee, against The City of Los Angeles, in the United States circuit court of the 9th circuit for the southern district of California, being case # 583) and to agree to pay said rental to the city of Los Angeles, and that in case of the failure to attorn and agree to pay said rental said company and all other persons and corporations do refrain from diverting, taking, or interferring with any of the water mentioned in this resolution (except said 10 inches) after the 20th of October, 1896.

Resolved further, That the city attorney be, and he is hereby, authorized and directed forthwith to institute suit in the name of the city of Los Angeles against said Los Angeles City Water Company to enjoin the diversion of all or any portion of said water (except said 10 inches), and to quiet title thereto, unless said company shall on or before October 20, 1896, so attorn and agree to pay rent, as aforesaid, and that the city attorney do also, in any event, bring suit in the name of the city of Los Angeles against the Crystal Springs Land and Water Company and S. G. Murphy, trustee, and all other persons and corporations claiming said water or any part thereof adversely to the city of Los Angeles, to quiet title to said water and enjoin said diversion thereof.

222 Resolved further, That the city attorney be, and he is hereby, authorized to bring such other suits, actions, and legal proceedings in regard to the water mentioned in this resolution or any part thereof or any other water belonging to the city of Los Angeles and against such persons and corporations as he may deem necessary or proper to protest or enforce the right of the city of Los Angeles thereto.

Resolved further, That the city attorney be, and he is hereby, directed to notify said Los Angeles City Water Company of this resolution, and to demand compliance therewith in such a manner as he may deem proper, and that he be, and hereby is, authorized and directed to give all notices and to make all demands on behalf of

the city of Los Angeles which he may consider necessary or proper to carry out the intent of this resolution or to advance or protect the interests of the city of Los Angeles in the premises.

Which resolution was adopted by the following vote:

Ayes—Messrs. Ashman, Blanchard, Kingery, Munson, Pessell, Snyder, and Stockwell—7.

Noes—None.

(See Book 47, page 461, Council Records.)

which said resolution has never been modified or repealed; and that thereafter, on said 19th day of October, 1896, the city attorney of said city did, in writing, notify said Los Angeles City Water Company and the other complainant, Crystal Springs Land & Water Company, of said resolution and demanded compliance therewith, and with such notification did deliver a copy of said resolution to each of said companies, and that neither of said companies ever attorned to said city for said water or any part thereof or ever agreed to pay any rental for the same after the passage of said resolution, and that ever since said notification up to the present time said Los Angeles City Water Company has continuously taken from said Los Angeles river, at a point above the northern boundary
223 of said city, for the purpose of distributing and selling the same in said city, a quantity of water varying from 400 inches to 1,000 inches, measured under a four-inch pressure.

XXXVII.

That on December 13, 1886, said Los Angeles City Water Company, without consideration, made a deed of conveyance to said Crystal Springs Land & Water Company, whereby said Los Angeles City Water Company did convey to said Crystal Springs Land & Water Company all the grantor's interest in the portion of the Crystal Springs tract mentioned in the bill of complaint and therein alleged to have been conveyed to said Crystal Springs Land & Water Company, and also the conduit by which said Los Angeles City Water Company had theretofore been conveying water from its source of water supply down to the reservoir located on the west side of said river just above the Buena Vista Street bridge, and also all other water rights, rights of way, and other property claimed by said Los Angeles City Water Company outside of said city, and that thereafter, on December 30, 1886, said Crystal Springs Land & Water Company made a lease to said Los Angeles City Water Company purporting to lease to the latter all of the property so purported to (+ no)* have been conveyed by said last-mentioned deed, upon the terms that said Los Angeles City Water Company should pay to said Crystal Springs Land & Water Company monthly forty (+ no)* per cent. of the gross earnings and receipts realized by said Los Angeles City Water Company from the sale of water during the term of said lease, to wit, eleven years from January 1, 1887.

[* Sign and word enclosed in parentheses in pencil in copy.]

That on November 5, 1886, articles of incorporation of complainant Crystal Springs Land & Water Company were signed and acknowledged, and on November 10, 1886, the same were filed with the county clerk of Los Angeles county, California, and thereafter, on November —, 1886, a certificate of incorporation was issued to said company by the secretary of state.

224 That said corporation was formed with a capital stock of $1,240,000.00, of which $4,500.00 was subscribed for the term of fifty years, and for the purposes of buying, acquiring, receiving, selling, conveying, leasing, renting, and generally dealing in and with lands, waters, water rights, and water works in said county.

That ever since its incorporation the directors of said Crystal Springs Land & Water Company were also directors of said Los Angeles City Water Company.

That no assessments have ever been levied on the stockholders of said Crystal Springs Land & Water Company as such, but all of the expenses of said corporation and the price of the property purchased by it have been paid out of moneys collected by said Los Angeles City Water Company for rates for supplying water to the inhabitants of the city of Los Angeles or from moneys raised by joint loans contracted by both companies.

XXXVIII.

The city of Los Angeles has always had flowing in the Los Angeles river at the point from which said Los Angeles City Water Company has always diverted water from said river a quantity of water sufficient to have supplied said Los Angeles City Water Company with all the water required to supply said city and its inhabitants with water for domestic purposes and municipal uses, and has never objected up to October 20, 1896, to said Los Angeles City Water Company taking as much water from said river as it might require for said uses, and during all of said period said city has never objected to said company's taking from the surface stream of said river at said point as much water as said company needed for said uses.

XXXIX.

Wherever in this stipulation and in other places it is said that the council of the city duly passed an ordinance entitled so and so, it is hereby agreed that by the use of the word "duly" nothing is conceded by either party as to the power of the council to

225 pass the resolutions or ordinances referred to, nor of the effect thereof, but only that so far as the forms and proceedings required by statute or otherwise to be observed in the passage of resolutions or ordinances are concerned they were complied with in the instances referred to, and that the proceedings themselves culminating in the resolution or ordinance were regularly had and taken; and where in this stipulation nothing is said about the publication of an ordinance or resolution where publication is required, it is to be understood that such publication was made.

XL.

That the articles of incorporation of said Los Angeles City Water Company were dated August 15, 1868, acknowledged August 17, 1868, and filed with the county clerk on the same date, and the certificate of incorporation was issued to the said company by the secretary of state August 26, 1868.

The incorporators of said company were Griffen, Beaudry, and Lazard, parties to the contract set forth in the bill of complaint, and others.

Said Griffin, Beaudry, and Lazard applied for said contract on behalf of themselves and of other persons who united with them in the formation of said company, and procured said contract for the benefit of themselves and all of said other persons with the intention of forming a corporation to carry out said contract.

Said Los Angeles City Water Company was incorporated for the term of thirty years, with a capital stock of $220,000.00, for the purpose of supplying the inhabitants of said city of Los Angeles with water for domestic purposes and conducting the same into and distributing the same through the streets and alleys of said city by means of pipes, tubes, hydrants, flumes, ditches, wheels, reservoirs, pumps, or other machinery, said water to be taken from the Los Angeles river or the zanjas and branches thereof or springs forming the same, or from such other source of supply as said corporation might find convenient and economical; and to make certain improvements, and to sell and distribute water to the inhab-
226 itants of said city for domestic purposes under the terms of the contract set forth in the bill of complaint.

Said Griffin, Beaudry, and Lazard did nothing personally with regard to carrying out said contract or constructing or maintaining any water works, but said Los Angeles City Water Company, as soon as it was formed, proceeded with the carrying out of said contract and did everything that has ever been done under said contract.

XLI.

At the time of the signing and delivery of the contract set forth in the bill of complaint and during the whole of the year 1868 the territorial limits of the city of Los Angeles under its existing charter were as follows: Four square leagues in a square form, the center whereof is the center of the old pueblo plaza.

Since then, in about 1872, the limits were extended 420 yards south of the former south boundary, and within the past three years and prior to July, 1897, the limits were further extended, so as to take in about between ten and fifteen square miles of additional adjoining territory; but immediately after the extension of the said limits the Los Angeles City Water Company began to extend its pipes over the said addition to the city as the same was settled up and improved, and ever since has been and is now furnishing water to the people in the said district added to the original territory of the city, and did, upon the demands of the city council, erect fire-hydrants within the said additional territory and furnished water

free of charge, and has in all respects continued to lay pipes, erect fire-hydrants, and furnish the inhabitants with water for domestic uses in like manner as it has conducted the same business within the original limits of the city as established by the act incorporating it; and so with the more recent extensions of the city limits, to wit, those made within the last three years, the company has also extended its pipes in portions of those limits and furnished water in the same way.

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XLII.

On June 28, 1880, the council of said city duly passed an ordinance entitled "An ordinance to establish regulations of water rates furnished to inhabitants of this city by the Los Angeles City Water Company," which was approved June 29, 1880, by the mayor and published June 30, 1880, whereby it was provided that "the water rates and charges of the Los Angeles City Water Company from July 1, 1880, to July 1, 1881, are hereby established as follows, to wit: 1. For tenements occupied by single family of not more than five persons, $2.00; 2, for each additional person, 15 cents." (Here follows 28 additional rates, each one of which is less than that prescribed in the rates adopted in 1870.)

On February 24, 1881, an ordinance entitled "An ordinance to establish regulations of water rates furnished to the inhabitants of the city of Los Angeles for the year commencing on July 1, 1881," was duly passed by the council of said city and approved March 7, 1881, by the mayor and published March 8, 1881, providing that "the rates to be charged for water by any corporation, company or individual, now furnishing water to the inhabitants of the city of Los Angeles, or to furnish the same hereafter, shall be and are as follows, for the year commencing July 1, 1881, and the following schedule of rates is hereby established and declared to be the water rates for said city during said period: For tenements occupied by single family of not more than five persons, $2.00; for each additional person, 25 cents." (Here follows 24 additional rates, each one of which is less than that prescribed in the rates adopted in 1870.)

On January 4, 1882, an ordinance was duly passed by the council of said city and approved January 6, 1882, and published January 7, 1882, requiring all persons, companies, or corporations furnishing water to the inhabitants of said city to furnish during the month of January of each and every year the said council with a detailed statement of the affairs of said corporation, person, or company,
228 as required by sections 2 and 3 of an act of the legislature of the State of California approved March 7, 1881, and entitled "An act to enable the board of supervisors, town council, board of aldermen or other legislative body of any city and county, city or town to obtain data and information from any corporation, company or person supplying water to such city and county, city or town, requiring such boards, town council or other legislative body to perform the duties prescribed by section one of article fourteen of the constitution, and prescribing penalties for the non-performance of such duties."

On February 21, 1882, an ordinance entitled "An ordinance to establish regulations of water rates furnished to the inhabitants of the city of Los Angeles for the year commencing on July 1, 1882," was duly passed by the council of said city and approved by the mayor February 23, 1882, and published February 24, 1882, providing that "the monthly rates of compensation to be collected by any person, company, or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic purposes for the year commencing July 1, 1882, and ending June 30, 1883, are hereby fixed as follows: For tenements occupied by a single family of not more than five persons, for one-story buildings, $1.50; for two-story buildings, $2.00; for three-story buildings, $2.50; for each additional person in any one family over five, 15 cents." (Here follow 12 other rates, each one of which is less than that prescribed in the water rates adopted in 1870.)

On February 23, 1883, an ordinance entitled "An ordinance establishing water rates and fixing the compensation for water to be furnished by any person, company, or corporation for family uses, for private purposes, for municipal uses, and for all public purposes in the city of Los Angeles for the year commencing July 1st, 1883," was duly passed by the council of said city and approved by the mayor February 24, 1883, and published February 27, 1883, providing that "the monthly rates of compensation to be collected by any person, company, or corporation engaged in the business
229 of supplying water to the inhabitants of the city of Los Angeles for domestic purposes, for private purposes, for municipal purposes and for all public purposes of said city for the year commencing July 1st, 1883, and ending June 30th, 1884, are hereby fixed as follows: For tenements, including for bath-tub, occupied by a single family, for one-story buildings, $1.50; for two-story buildings, $2.00; for three-story buildings, $2.50." (Here follow 14 additional rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 11, 1884, an ordinance entitled "An ordinance establishing water rates and fixing the compensation for water to be furnished by any person, company, or corporation for family uses, for private purposes, for municipal uses, and for all public purposes in the city of Los Angeles for the year commencing July 1, 1884," was duly passed by the council of said city and approved by the mayor February 15, 1884, and published February 22 and 23, 1884, providing that "the monthly rates of compensation to be collected by any person, company, or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic purposes, for private purposes, for municipal purposes, and for all public purposes of said city for the year commencing July 1, 1884, and ending June 30, 1885, are hereby fixed as follows: For tenements (including for bath-tub) occupied by a single family, for one-story buildings, $1.50; for two-story buildings, $2.00; for three-story buildings, $2.50." (Here follow 12 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 17, 1885, an ordinance entitled "An ordinance es-

tablishing water rates and fixing the compensation for water to be furnished by any person, company, or corporation for family uses, for private purposes, for municipal uses, and for all public purposes in the city of Los Angeles, for the year commencing July 1, 1885," was duly passed by the council of said city and approved by the mayor February 21, 1885, and published February 24, 1885,
230 providing that "the monthly rates of compensation to be collected by any person, company, or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic purposes, for private purposes, for municipal purposes, and for all public purposes of said city for the year commencing July 1, 1885, and ending June 30, 1886, are hereby fixed as follows: For tenements, including bath-tub, occupied by single family, for one-story buildings, one dollar and fifty cents; for two-story buildings, two dollars; for three-story buildings, two dollars and fifty cents." (Here follow 12 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 26, 1886, an ordinance entitled "An ordinance establishing water rates and fixing the compensation for water to be furnished by any person, company, or corporation for family uses, for private purposes, and for other uses in the city of Los Angeles for the year commencing July 1, 1886," was duly passed by the council of said city and was presented to the mayor for his approval March 1, 1886, and returned by him to the clerk of the council without his approval March 22, 1886, and thereupon became as effective and valid as if the mayor had approved it, and was published March 22, 1886, providing that "the monthly rates of compensation to be collected by any person, company, or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic and other purposes for the year commencing July 1, 1886, and ending June 30, A. D. 1887, are hereby fixed as follows: For tenements occupied by a single family, including bath-tub and water-closet, one dollar and fifty cents ($1.50)." (Here follow 11 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 15, 1887, an ordinance entitled "An ordinance establishing water rates and fixing the compensation for water to be furnished by any person, company, or corporation for family uses, for private purposes, and for other uses in the city of Los Angeles for the year commencing July 1, A. D. 1887," was duly
231 passed by the council of said city and approved by the mayor February 21, 1887, and published February 22, 1887, providing that "the monthly rate of compensation to be collected by any person, company, or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic and other purposes for the year commencing July 1, A. D. 1887, and ending June 30, 1888, are hereby fixed as follows: For tenements occupied by a single family, including bath-tubs and water-closets, one dollar and fifty cents ($1.50)." (Here follow 13 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 27, 1888, an ordinance entitled "An ordinance

establishing water rates and fixing the compensation for water to be used by any person, company, or corporation for family uses, for private purposes, and for other uses in the city of Los Angeles for the year commencing July 1, A. D. 1888," was duly passed by the council of said city and approved by the mayor March 3, 1888, and published March 6, 1888, providing that "the monthly rate of compensation to be collected by any person, company, or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic and other purposes for the year commencing July 1, A. D. 1888, and ending June 30, 1889, are hereby fixed as follows: For tenements occupied by a single family, including bath-tubs and water-closets, one dollar and fifty cents ($1.50)." (Here follow 13 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On March 18, 1889, an ordinance entitled "An ordinance establishing water rates and fixing the compensation for water to be furnished by any person, company, or corporation for domestic purposes, for private purposes, and for other uses in the city of Los Angeles for the year commencing July 1, 1889, and ending the 30th day of June, 1890," was duly passed by the council of said city and approved by the mayor March 20, 1889, and published March 25,
1889, providing that the monthly rate of compensation to be
232 collected by any person, company, or corporation engaged in
the business of supplying water to the inhabitants of the city of Los Angeles for domestic and other purposes for the year commencing July 1, A. D. 1889, and ending June 30, 1890, are hereby fixed as follows: For tenements-houses occupied by a single family, including bath-tubs and water-closets, $1.50 per month." (Here follow 19 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 24, 1890, an ordinance entitled "An ordinance regulating the rates and compensation allowed to be collected by any person or corporation supplying water for domestic use and private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1, 1890, and ending June 30, 1891," was duly passed by the council of said city and approved by the mayor March 8, 1890, and published March —, 1890, providing that "the monthly rates to be collected by any person or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic uses and for private purposes for the year commencing July 1, 1890, and ending June 30, 1891, are hereby fixed as follows: For every tenement or dwelling house of not exceeding three living-rooms, occupied by a single family, 75 cents; for every tenement or dwelling house of four living-rooms, occupied by a single family, 90 cents; for every tenement or dwelling house of five living-rooms, occupied by a single family, $1.00; for every tenement or dwelling house of six living-rooms, occupied by a single family, $1.15; for every tenement or dwelling house of seven living-rooms, occupied by a single family, $1.30; for every tenement or dwelling house of eight living-rooms, occupied by a single family, $1.45; for every tenement or dwelling house of nine living-rooms,

occupied by a single family, $1.60; for every tenement or dwelling house of ten living-rooms, occupied by a single family, $1.75; for every tenement or dwelling house having over ten living-
233 rooms and occupied by a single family, for every additional room, 10 cents." (Here follow 22 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 24, 1891, an ordinance entitled "An ordinance regulating the rates and compensation allowed to be collected by any person or corporation supplying water for domestic use and private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1, 1891, and ending June 30, 1892," was duly passed by the council of said city and approved by the mayor March 9, 1891, and published March 10, 1891, providing that "the monthly rates to be collected by any person or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic and private purposes for the year commencing July 1, 1891, and ending June 30, 1892, are hereby fixed as follows: For every tenement or dwelling house of not exceeding three living-rooms, occupied by a single family, 75 cents; for every tenement or dwelling house of four living-rooms, occupied by a single family, 90 cents; for every tenement or dwelling house of five living-rooms, occupied by a single family, $1.00; for every tenement or dwelling house of six living-rooms, occupied by a single family, $1.15; for every tenement or dwelling house of seven living-rooms, occupied by a single family, $1.30; for every tenement or dwelling house of eight living-rooms, occupied by a single family, $1.45; for every tenement or dwelling house of nine living-rooms, occupied by a single family, $1.60; for every tenement or dwelling house of ten living-rooms, occupied by a single family, $1.75; for every tenement or dwelling house of over ten living-rooms, and occupied by a single family, for every additional room 10 cents." (Here follow 29 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 24, 1892, an ordinance entitled "An ordinance regulating the rates and compensation allowed to be collected by any person or corporation supplying water for domestic use and
234 private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1, 1892, and ending June 30, 1893," was duly passed by the council of said city and approved by the mayor on February 27, 1892, and published February 29, 1892, providing that "the monthly rates to be collected by any person or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic and private purposes for the year commencing July 1, 1892, and ending June 30, 1893, are hereby fixed as follows: For every tenement or dwelling house of not exceeding three living-rooms, occupied by a single family, 75 cents; for every tenement or dwelling house of four living-rooms, occupied by a single family, 90 cents; for every tenement or dwelling house of five living-rooms, occupied by a single family, $1.00; for every tenement or dwelling house of six living-rooms, occupied by a single family, $1.15; for every tenement or

dwelling house of seven living-rooms, occupied by a single family, $1.30; for every tenement or dwelling house of eight living-rooms, occupied by a single family, $1.45; for every tenement or dwelling house of nine living-rooms, occupied by a single family, $1.60; for every tenement or dwelling house of ten living-rooms, occupied by a single family, $1.75; for every tenement or dwelling house of over ten living-rooms, and occupied by a single family, for every additional room, 10 cents." (Here follows 29 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 27, 1893, an ordinance entitled "An ordinance regulating the rates and compensation allowed to be collected by any person or corporation supplying water for domestic use and private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1, 1893, and ending June 30, 1894," was duly passed by the council of said city and approved by the mayor on February 28, 1893, and published March 2, 1893, providing that "the monthly rates to be collected by any person or corporation engaged in the business of supplying water to the inhab-
235 itants of the city of Los Angeles for domestic and private purposes for the year commencing July 1, 1893, and ending June 30, 1894, are hereby fixed as follows: For every tenement or dwelling house of not exceeding three living-rooms, occupied by a single family, 75 cents; for every tenement or dwelling house of four living-rooms, occupied by a single family, 90 cents; for every tenement or dwelling house of five living-rooms, occupied by a single family, $1.00; for every tenement or dwelling house of six living-rooms, occupied by a single family, $1.15; for every tenement or dwelling house of seven living-rooms, occupied by a single family, $1.30; for every tenement or dwelling house of eight living-rooms, occupied by a single family, $1.45; for every tenement or dwelling house of nine living-rooms, occupied by a single family, $1.60; for every tenement or dwelling house of ten living-rooms, occupied by a single family, $1.75; for every tenement or dwelling house of over ten living-rooms and occupied by a single family, for every additional room, 10 cents." (Here follow 29 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 23, 1894, an ordinance entitled "An ordinance regulating the rates and compensation allowed to be collected by any person or corporation supplying water for domestic use and private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1, 1894, and ending June 30, 1895," was duly passed by the council of said city and approved by the mayor on February 23, 1894, and published February 24, 1894, providing that "the monthly rates to be collected by any person or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic and private purposes for the year commencing July 1, 1894, and ending June 30, 1895, are hereby fixed as follows: For every tenement or dwelling house of not exceeding three living-rooms, occupied by a single family, 65 cents; for every tenement or dwelling house of four living-
236 rooms, occupied by a single family, 80 cents; for every tenement or dwelling house of five living-rooms, occupied by a

single family, $1.00; for every tenement or dwelling house of six living-rooms, occupied by a single family, $1.15; for every tenement or dwelling house of seven living-rooms, occupied by a single family, $1.30; for every tenement or dwelling house of eight living-rooms, occupied by a single family, $1.45; for every tenement or dwelling house of nine living-rooms, occupied by a single family, $1.60; for every tenement or dwelling house of ten living-rooms, occupied by a single family, $1.75; for every tenement or dwelling *hous* house of over ten living-rooms and occupied by a single family, for every additional room, 10 cents." (Here follow 32 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 25, 1895, an ordinance entitled "An ordinance regulating the rates and compensation allowed to be collected by any person or corporation supplying water for domestic and private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1, 1895, and ending June 30, 1896, was duly passed by the council of said city and approved by the mayor March 5, 1895, and published March 8, 1895, providing that "the monthly rates to be collected by any person or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic and private purposes for the year commencing July 1, 1895, and ending June 30, 1896, are hereby fixed as follows: For every tenement or dwelling house of not exceeding three living-rooms, occupied by a single family, 65 cents; for every tenement or dwelling house of four living-rooms, occupied by a single family, 80 cents; for every tenement or dwelling house of five living-rooms, occupied by a single family, $1.00; for every tenement or dwelling house of six living-rooms, occupied by a single family, $1.15; for every tenement or dwelling house of seven living-rooms, occupied by a single family, $1.30; for every tenement or dwelling house of eight living-rooms, occupied by a single family,
237 $1.45; for every tenement or dwelling house of nine living-rooms, occupied by a single family, $1.60; for every tenement or dwelling house of ten living-rooms, occupied by a single family, $1.75; for every tenement or dwelling house of over ten living-rooms and occupied by a single family, for every additional room, 10 cents." (Here follow 32 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

On February 24, 1896, an ordinance entitled "An ordinance regulating the rates and compensation allowed to be collected by any person or corporation supplying water for domestic and private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1, 1896, and ending June 30, 1897," was duly passed by the council of said city and approved by the mayor February 28, 1896, and published February 29, 1896, providing that "the monthly rates to be collected by any person or corporation engaged in the business of supplying water to the inhabitants of the city of Los Angeles for domestic and private purposes for the year commencing July 1, 1896, and ending June 30, 1897, are hereby fixed as follows: For every tenement or dwelling house of

not exceeding three living-rooms, occupied by a single family, 55 cents; for every tenement or dwelling house of four living-rooms, occupied by a single family, 65 cents; for every tenement or dwelling house of five living-rooms, occupied by a single family, 85 cents; for every tenement or dwelling house of six living-rooms, occupied by a single family, $1.00; for every tenement or dwelling house of seven living-rooms, occupied by a single family, $1.10; for every tenement or dwelling house of eight living-rooms, occupied by a single family, $1.25; for every tenement or dwelling house of nine living-rooms, occupied by a single family, $1.35; for every tenement or dwelling house of ten living-rooms, occupied by a single family, $1.50; for every tenement or dwelling house of
238 over ten living-rooms and occupied by a single family, for every additional room, 5 cents." (Here follow 32 other rates, each of which is less than that prescribed in the rates adopted in 1870.)

XLIII.

In January, 1882, the complainant Los Angeles City Water Company furnished to the council of the city of Los Angeles a statement of its transactions for the past year.

After the ordinance adopted February 21, 1882, establishing water rates, was passed by said council, and on the same day, the Los Angeles City Water Company presented the following protest:

"To the mayor and common council of the city of Los Angeles.

"GENTLEMEN: The Los Angeles City Water Company protests against the rates established by you fixing rates for houses less than $2.00; also against your fixing rates on any other basis than that of the contract and lease now existing between your body and the company.

"We also call your attention to the law of 1881 in regard to notice which you have neglected to conform to and which would appear to render members of your body liable to indictment for malfeasance in office."

During each of the succeeding years up to and including the present, and prior to March 1st of each year, the Los Angeles City Water Company has furnished to the council statements in writing, hereinafter set forth, each of said statements being followed by a list showing the name of each rate-payer and the amount paid by such rate-payer for water furnished him by said company during the year for which such statement was rendered.

The following are the statements above referred to:

239 *Statement of Los Angeles City Water Company, February 20, 1883.*

Filed February 20, 1883, with clerk of city council. Filed April 6, 1883, with county recorder.

To the honorable council of the city of Los Angeles.

GENTLEMEN: Attached you will find a statement showing the names of the consumers of water, the rates paid during the year preceding the date of the statement, also an itemized statement of the expenditures made for supplying water during the year preceding.

Accompanying the statement you will find another statement, showing, as far as we are able to show, the amount of money expended since commencing business the 1st of November, 1882, in the purchase, construction, and maintenance of the water works under the charge of the Los Angeles Water Company and the gross cash receipts for the same period from all sources.

In presenting this report we respectfully submit to your honorable body that, in our opinion, the law of March, 1881, providing for fixing rates and requiring statements from persons and corporations furnishing water to cities and towns for domestic purposes, and found on pages 54, 55, and 56 of the Laws of 1881, do not apply to the Los Angeles City Water Company or in any way alter the relations existing between the city of Los Angeles and the water company before the new constitution was adopted, and we therefore respectfully call your attention to the following statement of our relations with the city as we understand them:

On the 7th day of August, 1865, the city of Los Angeles was the owner of certain water works in the city of Los Angeles, and on that day leased them to one J. L. Sainsevaine for four years, with the privilege of continuing the lease for six years longer, being really a lease for ten years.

Mr. Sansevaine carried on the water works under his lease for less than three years, and on the 1st day of February, 1868, assigned
240 to Messrs. John S. Griffin, Prudent Beaudry, and Solomon Lazard, who for a few months operated the water works under the Sainsevaine lease.

On the 20th of July, 1868, the mayor and common council entered into an agreement with the above-named gentlemen by which the water works were to be leased to them, to take effect on their surrender of the Sainsevaine contract, and an ordinance adopted July 22, 1868, authorized the mayor to sign the lease on behalf of the city, which was done, and on the 25th of July, 1868, the Sainsevaine lease was surrendered.

On the 18th of August, 1868, the Los Angeles City Water Company was incorporated, as shown by the articles of incorporation, for the purpose of supplying the inhabitants of the city of Los Angeles with water for domestic purposes under the terms of the contract

made between the city and Griffin, Beaudry, and Lazard on the 20th of July, 1868.

On the 12th of June, 1869, the lease and contract was assigned to the water company.

On the 2nd of April, 1870, the legislature, on petition of the mayor and common council of Los Angeles, ratified the lease and contract under which the Los Angeles City Water Company have acted since the same was assigned to them, June 12, 1869, and a copy of which will be found on page 132 of Caswell's City Ordinances.

This lease, as you will observe by reference to page 135, provides that your body reserves the right to regulate the water rates, provided they do not reduce them below the rates charged at the time the contract was made.

These rates were determined by an investigation of the city council, who find the rates at its session of April 14, 1870, and, as will be seen by reference to vol. 7, page 92, of your records, fixed them at the rates existing when the contract was made. Those rates were the same as afterwards re-established, and to be found on page 238 of your City Ordinances.

241 The lease was made for thirty years, and at the expiration of that time the city is bound to pay the company for its improvements (page 133, City Ordinances) the value as determined by three referees.

There are many things provided by the lease for us to do and which we have always done. We have lived up to our contract in every respect and expect to do so until the end of the term.

But we submit to your body that in the contract which we hold there is no provision that we are to be required to furnish under oath statements such as are required by sections 2 and 3 of the act referred to, and that that law obliges us to do that which the city never asked of us to do and which the contract does not call for. In other words, the legislature, after having sanctioned the contract which we accepted and to the provisions of which we have conformed, insert new and important provisions materially affecting our rights under the contract, and which if enforced would greatly impair the obligations of the contract.

The lease gives you the right to fix the rates, not, however, to be less than what they were at a certain time, but by agreeing to the demand made upon us under the above law, and making the statement therein required, you are then to regulate our rates, not in accordance with the contract, but without reference to the contract. It will thus be seen that the law, taken as a whole, gives you the right and makes it your duty to fix our rates regardless of the terms of the contract, and for the purpose of establishing a basis you may compel us under oath to give you an itemized history of our business.

We do not pretend to say that this is not a constitutional law, but it does not apply to either persons or corporations in our situation and with a valid contract.

242 Sec. 10 of art. *L* of the Constitution of the U. S. provides that no State shall pass any law impairing the obligation of

contracts; and under this provision of the organic law of the land we claim exemption from the operation of the law referred to.

We have, however, no personal objection to making the statement required, and we consider that your body may properly consider it in the interest of the city, in view of the fact that the city will be obliged to pay for the improvements at the end of the term, to require us from time to time to give an account of the cost of the improvements and the expense of carrying on the work and the number of consumers and the prices paid for them; and we therefore, while denying any legal right on your part, either under the contract or any law of the State, to demand it, annex the following statement simply as an act of courtesy, feeling that the same desire to conciliate and please which actuates us in our present action will be returned by your honorable body to us when occasion might require.

WM. H. PERRY,
S. H. MOTT,
I. W. HELLMAN,
C. DUCOMMUN,
L. BERNARD,
WM. FERGUSON,
S. LAZARD,
W. J. BRODRICK,
Trustees.

Then follows "residence, names, and residences of consumers and prices paid for water for year preceding No. 1, 1882."

243 *Statement of Los Angeles City Water Company for the Period of Twelve Months from February 1st, 1882, to January 31st, 1883.*

Receipts.

From service connections	$5,244.00
" water rates	52,944.30
" rent	275.00
" sale of pipe	2,997.27
" borrowed, F. & M. bank	5,000.00

Disbursements.

For general expenses	$21,105.05
" ditch	7,636.07
" pipe	17,012.74
" reservoir	4,156.41
" disbursed to stockholders	24,799.60

W. H. PERRY,
Acting President of the Los Angeles City Water Company.
S. H. MOTT, *Secretary.*

Subscribed and sworn to, on information and belief, before me this 19th day of February, A. D. 1883.

[N. S.] ROB'T H. CHAPMAN.

Statement of Receipts and Expenditures of the Los Angeles City Water Company from its Incorporation to October 31st, 1883.

Receipts.

From water rent	$489,714.45
" amount paid by stockholders	79,500.00
" sale of bonds	100,000.00
" service connections	16,629.43
" rents, plaza property	3,655.30

Disbursements.

East Los Angeles reservoir	$2,586.47
Old reservoir	3,785.88
New do.	9,646.52
Ditch	54,236.04
Plaza fountain	1,167.48
" property	1,924.84
Pipe ac	151,349.39
Rent as per contract to city	9,354.89
General expense account	203,024.10
Distributed to stockholders	239,623.11
Paid ten bonds	10,000.00
Expense of purchasing water works, pipes, real estate, and water privileges used by the Los Angeles Water Company, nine hundred (900) shares of the Los Angeles City Water Company's stock, having a par value of one hundred dollars cash, and at that time estimated to be worth by the company at $50.00 per share, making	45,000.00

W. H. PERRY,
Acting President Los Angeles City Water Company.
S. H. MOTT, *Secretary.*

Subscribed and sworn to, on information and belief, excepting as to matter of value of shares given for the purchase of water works, pipes, real estate, and privileges, which we only know of and concerning from statement made to us by officers and stockholders of the company, before me this 19th day of February, A. D. 1883.

[N. S.] ROB'T H. CHAPMAN, *Notary.*

244 *Statement of Los Angeles City Water Company.*

Filed January 29, 1884, with clerk of city council; filed Feb. 6, 1884, with county recorder.

To the honorable council of the city of Los Angeles:

The Los Angeles City Water Company, protesting against the right of your hon. body to demand the same, but only for the purpose of giving information and with the same view as to the rights

of the company expressed in our former statement, hereby submit to your hon. body a detailed statement, showing the name of each water-rate payer, his place of residence, and the amount paid for water by each during the year preceding the date of this statement, and also showing all revenue derived from all sources and an itemized statement of expenditures made for supplying water during the time intervening since our last report. This statement embraces all receipts and expenditures for the last year, and we respectfully refer your hon. body to our last report for all the matter provided for in section 3 of the act of March 7, 1881, relating to water companies. We fail to append the statement required in section 3 to this statement, and instead thereof refer to our report on file of last year, and which contains all that is required in section 3, there being nothing to add to it except that contained in the annual reports heretofore and now submitted.

Statement of the Los Angeles City Water Company for the Period of Twelve Months from November 1, 1882, *to November* 1, 1883.

Receipts.

Service connections	$7,190.00
Water rents	63,684.00
Rent of plaza property	231.00
Borrowed from F. & M. bank	20,000.00
Sale of old iron, wood, etc	1,500.00

Disbursements.

Ditch	$5,077.00
Pipe	28,914.00
Reservoir	4,416.00
Plaza property	2,436.00
Bills payable	10,000.00
General expenses	18,477.00

S. H. MOTT,
Secretary L. A. C. W. Co.

Sworn to and subscribed before me this 29th day of January, 1884.
[SEAL.] ROB'T H. CHAPMAN.

245 *Report of the Los Angeles City Water Company, February* 2, 1885.

Filed March 6th, 1885, with county recorder.

To the honorable council of the city of Los Angeles:

The Los Angeles City Water Company, protesting against the right of your hon. body to demand the same, but only for the purpose of giving information and with the same view as to the rights of the company expressed in our former statement, hereby submit to your hon. body a detailed statement, showing the name of each water-rate payer, his place of residence, and the amount paid for water by each during the year preceding the date of this statement,

and also showing all revenue derived from all sources and an itemized statement of expenditures made for supplying water during the time intervening since our last report. This statement embraces all receipts and expenditures for the last year, and we respectfully refer your hon. body to our first report for all the matter provided for in section 3 of the act of March 7, 1881, relating to water companies. We fail to append the statement required in section 3 to this statement, and instead thereof refer to our report on file February 20, 1883, which is hereby referred to and made a part hereof, and which contains all that is required in section 3, there being nothing to add to it except that contained in the annual reports heretofore and now submitted.

Statement of Los Angeles City Water Company for the Period of Twelve Months from November 1, 1883, *to November* 1, 1884.

Receipts.

Service connections	$8,605.65
Pipe	3,710.59
Plaza property	550.00
Bills payable, F. & M. bank	10,000.00
Water rents	81,971.80

During the same time the disbursements have amounted to the sum of—

Pipe	42,652.14
General expense, including taxes	13,164.20
Interest	6,825.00
Ditch	3,511.90
Reservoir	9,651.05
Plaza property	381.94
Five bonds redeemed	5,000.00
Dividends	24,799.92

W. H. PERRY, *President.*
S. H. MOTT, *Secretary.*

Subscribed and sworn to before me this 21st day of January, A. D. 1885.

JAS. C. KAYS,
Notary Public.

246 *Report of Sales, Los Angeles City Water Company, November* 1, 1884, *to November* 1, 1885.

Filed January 28, 1886.

Statement same as previous one.

Statement of Los Angeles City Water Company for the Period of Twelve Months from November 1, 1884, *to November* 1, 1885.

Receipts.

Service connections	$4,955.00
Rents of plaza property	410.00
Sale of pipe	1,145.85
Bills payable	4,000.00
Cash paid by stockholders on increase of capital stock	51,650.00
Water rents	100,062.00

During the same time the disbursements have amounted to the sum of—

Pipe expense	$37,004.02
Interest "	6,477.56
General "	21,316.38
Ditch "	8,950.73
Reservoir "	756.91
Dividend "	38,298.48
Bills payable "	34,000.00

LOS ANGELES CITY WATER COMPANY,
By W. H. PERRY, *President*,
" S. H. MOTT, *Secretary*.

Sworn to and subscribed before me this 28th day of January, 1886.

JAMES C. KAYS,
Notary Public.

247 *Annual Statement of Los Angeles City Water Company for Year Ending October* 31, 1886.

Filed January 28, 1887.

Statement is the same as previous one, excepting that it ends after the words " Act of March 7, 1881, relating to water companies."

Statement of Los Angeles City Water Company for the Period of Twelve Months from November 1, 1885, *to October* 31, 1886.

Receipts.

New issue of stock sold	$51,650.00
Service connections	6,503.00
Pipe sold	2,697.20
Rent of brick shop	250.00
Sundries	97.00
Water rents	118,779.84

During the same time the disbursements have amounted to the sum of—

New improvements	$52,528.12
Ditch	7,913.74
Pipe	29,698.48
General expenses	27,788.23
Reservoir	658.29
Ling property	1,403.30
Interest	5,089.00
Bills payable	5,000.00
Dividends	46,430.50

W. H. PERRY, *President.*
S. H. MOTT, *Secretary.*

STATE OF CALIFORNIA, }
County of Los Angeles, } ss:

Subscribed and sworn to before me this 11th February, 1887.
ROB'T H. CHAPMAN,
Notary Public.

Subscribed and sworn to before me this 1st day of March, 1887, by W. H. Perry.
FREEMAN G. TEED,
Clerk of the Council of the City of Los Angeles.

248 *Account of Sales of Water by Los Angeles City Water Company from November* 1, 1886, *to November* 1*st*, 1887.

Statement same as previous one, except that it ends with "This statement embraces all receipts and expenditures for last year."

Statement of the Los Angeles City Water Company for the Period of Twelve Months from November 1, 1886, *to November* 1, 1887.

Receipts.

Pipe sold	$9,821.38
Bills payable	50,000.00
Water rents	148,041.85
General expense (warrants cancelled)	1,171.65
Service connections	16,764.00
New imp't	83.87
Ditch	5.10

During the same time the disbursements have been as follows, to wit:

New improvement expense		$34,881.66
Reservoir	"	13,206.10
Ditch	"	3,120.07
General	"	70,588.47

Dividend	expense	33,064.00
Interest	"	5,643.75
Pipe	"	64,889.12
Bills payable	"	5,000.00

LOS ANGELES CITY WATER COMPANY,
By W. H. PERRY, *President*,
" S. H. MOTT, *Secretary*. [CORPORATION SEAL.]

Sworn to and subscribed before me this January, 1888.

——— ———.

249 *Report from L. A. City Water Co., Filed January* —, 1888, *for Year Ending November* 1*st*, 1888.

Statement same as last one.

Statement of the Los Angeles City Water Company for the Period of Twelve Months from November 1, 1887, *to November* 1, 1888.

Receipts.

Bills payable	$330,000.00
" receivable	250.00
Plaza property	5,024.02
Pipe account	8,207.79
Interest	2,791.67
General expense	841.25
Service connections	20,819.00
Water rents	195,422.65

During the same time the disbursements have been as follows, to wit:

Bills payable		$145,000.00
" receivable		50,000.00
Plaza property		10,625.57
Pipe	expense	169,185.27
Interest	"	15,915.81
General	"	110,717.93
Ditch	"	2,095.00
New improvements	"	265.06
Reservoir		1,701.11
Dividend		45,465.00

LOS ANGELES CITY WATER COMPANY,
By W. H. PERRY, *President*,
" S. H. MOTT, *Secretary*. [CORPORATION SEAL.]

Sworn to and subscribed before me this 18th day of January, 1889.

[N. S.]

T. E. ROWAN,
Notary Public.

250 *Statement of the Los Angeles City Water Company from November 1, 1888, to November 1, 1889.*

To the council of the city of Los Angeles:

The undersigned, The Los Angeles City Water Company, hereby submit to your honorable body a detailed statement, showing the name of each water-rate payer, his or her place of residence, and the amount paid for water by each of said water-rate payers during the year preceding the date of this statement, and also showing all revenue derived from all sources and an itemized statement of expenditures made for supplying water during the time intervening since the last statement made by the undersigned to your honorable body.

In making this statement the undersigned is not to be held or deemed in any manner as waiving its rights under its contract or agreement with the city of Los Angeles in relation to furnishing the inhabitants of the city with water; and it does now, as it has ever heretofore, assert and claim that the water rates to be charged and collected for the supplying of water are fixed by said contract and are not subject to revision or changed by your honorable body; but the undersigned is now and ever has been ready and willing at all times to furnish your honorable body with any information that may be necessary or reasonable for a full understanding of the business of this company, and this statement is rendered for the purpose of placing before your honorable body information as to the facts of the business of this company that the undersigned deems reasonable that the city should know in view of the rights of the city under said contract; and the undersigned protests against any use being made of this report as a basis upon which to fix the rates that shall be charged and collected for water furnished to the inhabitants of the city of Los Angeles.

All of which is respectfully submitted.

Statement of the Los Angeles City Water Company for the Period of Twelve Months from November 1, 1888, to November 1, 1889.

Receipts.

Bills receivable	$50,000.00
Service connections	9,631.00
Pipe sundries	3,469.56
Plaza property	600.00
General expense	53.50
Water rents	220,592.58
	$284,346.64

During the same time the disbursements have amounted to the sum of $294,606.02.

Pipe	$85,467.69
Plaza property	634.36
Ditch	1,766.80
General expense	114,337.17
Interest	18,000.00
Dividends	74,400.00
	$294,606.02

LOS ANGELES CITY WATER COMPANY,
By W. H. PERRY, *President*,
" S. H. MOTT, *Secretary*.

Sworn to and subscribed before me this 29th day of January, 1890.
[N. S.]
N. LINDENFELD,
Notary Public.

251 *List of Consumers of the Los Angeles City Water Company, Their Residence, Street, and Amount Paid from November* 1, 1889, *to November* 1*st*, 1890.

Filed January 31, 1891.

Statement same as last one, except that it is signed:

"LOS ANGELES CITY WATER COMPANY,
By W. H. PERRY, *President*,
" S. H. MOTT, *Secretary*.

Subscribed and sworn to before me this 31st day of January, 1891, by W. H. Perry, president, and S. H. Mott, secretary, of the Los Angeles City Water Company.
[N. S.]
FREDERICK HARKNESS,
Notary Public."

Statement of the Los Angeles City Water Company for the Period of Twelve Months from November 1, 1889, *to November* 1, 1890.

Receipts.

Services sold	$5,161.00
Pipe sundries	1,370.05
Plaza property	600.00
Water rents	225,021.25
	232,152.30

During the same time the disbursements have amounted to the sum of $246,437.11.

Pipe	$25,113.57
Plaza property	940.09
Reservoir	34.25

Ditch and flume	5,860.26
Interest	18,000.00
General expenses	122,088.94
Dividends	74,400.00
	246,437.11

252 *Report from L. A. City Water Co., Filed February* 1, 1892, *for Year Ending November* 1, 1891.

Statement of the Los Angeles City Water Company for the period of twelve months from November 1, 1890, to November 1, 1891.

Receipts.

Material sold and other items	$1,034.35
Services and labor	4,816.00
Rents	600.00
Water rents	238,956.65
	245,407.00

Expenditures.

For general construction acc't	$53,914.36
Maintenance	48,815.13
General expense and repair	93,441.19
Interest on bonds and float, &c	27,519.80
Rights of way	125.00
Plaza property	10.24
Balance	21,581.28
	245,407.00

Statement same as last one, being signed:
"LOS ANGELES CITY WATER COMPANY,
By W. H. PERRY, *President*,
" S. H. MOTT, *Secretary*,"

but not sworn to.

253 *Report of the City Water Company for Year* 1892.

Filed January 31, 1893.

Statement of the Los Angeles City Water Company for the Period of Twelve (12) *Months from November* 1, 1891, *to October* 31, 1892.

Receipts.

Material sold	$745.93
Services and material	7,143.60
Rents	25.00
Water rents	246,487.33
	$254,401.86

Expenditures.

General construction acc't	$57,556.27
Do. expense, repairs, etc., account	99,398.54
Maintenance "	36,952.24
Interest on bonded debt	18,000.00
" " overdraft, etc.	6,427.59
Dividends paid	62,000.00
	$280,334.64

Statement same as last one, but not signed or sworn to.

254 *Statement of L. A. City Water Company for* 1893.

Filed January 24th, 1894.

Statement same as last one, but signed:

"LOS ANGELES CITY WATER COMPANY,
By S. H. MOTT, *Secretary*,"

but not sworn to.

Statement of the Los Angeles City Water Company for the Period of Twelve (12) *Months from November* 1, 1892, *to October* 31, 1893.

Receipts.

Material and labor sold	$1,714.43
Services " " "	10,274.80
Rent of house	16.00
Bills payable	275,569.00
Other indebtedness	10,347.32
Water rents	289,066.30
Total receipts	$586,987.85

Expenditures.

General construction acc't	$103,598.06
Maintenance	82,230.21
General expenses, repairs, etc	114,858.54
Interest paid	29,898.80
Dividend acc't	46,872.00
Citizen's Water Company's plant	160,316.50
East Side Spring Water Co.'s plant	18,000.00
Force main	14,681.46
Pump station	11,848.94
Crystal Springs Land and Water Company	4,500.00
Bills payable	20,000.00
Total expenditures	$606,804.51

255 *Report of the City Water Company*, 1894.

Filed January 31, 1895.

Statement of the Los Angeles City Water Company for the Period of 12 *Months from November* 1, 1893, *to October* 31, 1894.

Receipts.

Bills payable	$86,500.00
Services sold	16,457.19
Sundries	1,477.22
Water rents	345,691.64
	$450,126.05

Expenditures.

General construction account	106,801.28
" expense "	96,345.10
Maintenance "	50,212.05
Interest "	36,132.39
Land "	3,045.00
Pump station "	2,325.95
Dividend "	96,720.00
Bills payable "	65,000.00
	$451,126.05

Statement same as last one, being signed:

"LOS ANGELES CITY WATER COMPANY,
Per S. H. MOTT, *Secretary*,"

but not sworn to.

256 *City Water Company Report*, 1895.

Filed January 31, 1896.

Statement same as last one, signed:

"LOS ANGELES CITY WATER COMPANY,
By S. H. MOTT, *Secretary*,"

but not sworn to.

Statement of the Los Angeles City Water Company for the Period of 12 *Months from November* 1, 1894, *to October* 31, 1895.

Receipts.

Material and labor	$1,089.12
Service connections	24,085.35
Rent for house	96.00
Water rents	392,636.82
Bills payable	75,000.00
Total	$492,907.29

Expenditures.

General expense acc't	$47,007.51
" construction acc't	295,702.01
Maintenance	57,513.47
Interest	33,825.24
Bills payable	40,000.00
Land	2,429.50
Dividend	58,528.00
Total	$535,005.73

257 *Los Angeles City Water Company Report*, 1896.

Filed January 30, 1897.

Statement same as last one, signed:

"LOS ANGELES CITY WATER COMPANY,
By S. H. MOTT, *Secretary*,"

but not sworn to.

Statement of the Los Angeles City Water Company for the Period of Twelve Months from November 1, 1895, to October 31, 1896.

Receipts.

Material and labor	$1,251.33
Service connections	16,404.00
Rents	96.00
Water rents	422,220.46
	$439,971.79

Expenditures.

General construction account	$173,298.76
Expense "	92,358.88
Maintenance "	75,844.31
Interest "	35,457.84
Dividend "	68,200.00
	$445,159.79

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XLIV.

It is further stipulated between the parties hereto that this court may take judicial notice of all statutes passed by the legislature of the State of California in any manner affecting any question in controversy here, and whether such statute be public or private in its nature, in like manner and to the full extent as though such statute were fully set forth in this stipulation.

WHITE AND MONROE,
J. S. CHAPMAN,
Att'ys for Pl'ff.
W. E. DUNN,
LEE & SCOTT,
Solicitors for Defendants.

(Endorsed:) No. 734. U. S. circuit court, southern district of California. Los Angeles City Water Co. *et al. vs.* City of Los Angeles *et al.* Stipulation. Filed Feb. 14, 1898. Wm. M. Van Dyke, clerk.

259 In the Circuit Court of the United States, Ninth Circuit, Southern District of California. In Equity.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS Land and Water Company, and S. G. Murphy, Complainants,

vs.

THE CITY OF LOS ANGELES, HERMAN SILVER, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchinson, F. M. Nickell, and F. L. Baker, Composing the Council of the City of Los Angeles, Defendants. } No. 734.

The above-named defendants, conceiving themselves aggrieved by the decree made and entered on the 20th day of June, 1898, in the above-entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the records, pleadings, and papers upon which said order and decree was made, duly authenticated, may be sent to said Supreme Court.

Dated September 7th, 1898.

W. E. DUNN,
LEE & SCOTT,
ALBERT CRUTCHER,
Solicitors for Appellants.

The foregoing claim of appeal is allowed.

Dated September 7th, 1898.

OLIN WELLBORN, *Judge.*

260 Endorsed: Eq. No. 734. U. S. circuit court for the southern district of California. Los Angeles City Water Co. *et al. vs.* City of Los Angeles *et al.* Petition on appeal. Filed Sep. 7, 1898. Wm. M. Van Dyke, clerk. Lee & Scott and W. E. Dunn, A. Crutcher, solicitors for appellants.

261 In the Circuit Court of the United States, Ninth Circuit, Southern District of California. In Equity.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS Land and Water Company, and S. G. Murphy, Complainants,

vs.

THE CITY OF LOS ANGELES, HERMAN SILVER, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchinson, F. M. Nickell, and F. L. Baker, Composing the Council of the City of Los Angeles, Defendants. } No. 734.

Assignment of Errors on Appeal of Defendants to the Supreme — of the United States.

The defendants and appellants on their appeal to the Supreme Court of the United States from the decree made and rendered in the above-entitled cause make and assign the following specifications of error, and say that the decree in said cause is erroneous and against the just rights of said appellants for the following reasons:

First. Because the court overruled each and all of the exceptions taken by said appellants to the report of the special master on the exceptions of said appellants to the bill of complaint herein, whereas the court should have sustained each and all of said exceptions to said report.

Second. Because the court overruled the demurrer of said appellants to the bill of complaint herein, whereas the court should have sustained said demurrer on each and all of the grounds specified in said demurrer.

262 Third. Because the court rendered a decree in favor of complainants, whereas the court should have rendered a decree for said appellants on the bill and answer, inasmuch as it appeared from said bill of complaint that there was no valid contract between the complainant The Los Angeles City Water Company and the city of Los Angeles by reason of which the council of said city was prevented from lowering water rates and compensation for supplying water to said city and its inhabitants below the rates charged by the parties of the second part mentioned in the contract of date July 20, 1868, set forth in said bill.

Fourth. Because the court decided that the mayor and common council of the city of Los Angeles had authority at the time of the execution of the contract of date July 20, 1868, to execute the same so far as relates to the provision that said mayor and common council of the city of Los Angeles should not reduce water rates or so fix the price thereof to be less than those charged for water at the date of the execution of said contract, whereas said such municipality did not have such authority, and the only authority under which said mayor and common council of the city of Los Angeles could enter into a contract for the supplying of water to the inhab-

itants of said municipality was the 11th section of the act of the legislature of the State of California entitled "An act to provide for the incorporation of cities," passed March 11, 1850, which gave authority to the city council to make by-laws and ordinances not repugnant to the laws of said State to provide for supplying the city with water, and the 3rd section of an act of said legislature entitled "An act to provide for the incorporation of water companies," passed May 3, 1852, which gave authority to municipal corporations to enter into contracts only with corporations organized under the laws of said State for supplying water to such municipalities on condition that such contracts should not be made for a longer
263 term than twenty years, nor take from such city the right to regulate the rates for water, and the act of said legislature, entitled "An act for the incorporation of water companies," approved April 22, 1858, which authorized only corporations organized under the laws of said State for supplying water to cities to exercise the franchise of supplying water to such cities and collecting rates and compensation therefor, subject to the condition that the water rates should be fixed by commissioners, one of which was to be appointed by such company, one by the city, and one by the two thus selected, which provision was subject to amendment in any respect by the State, either through its legislature or by a change in its constitution, and there was no other act or statute in existence which authorized the execution of said contract of date July 20, 1868.

Fifth. Because the court decided that said section 3 of said act of May 3, 1852, did not apply to said contract of date July 20, 1868, whereas said contract was within the letter of said statute, and said contract, in so far as it purported to deprive said mayor and common council of the city of Los Angeles of the unrestricted right to regulate water rates, was contrary to the policy of said State as declared in the statutes then in existence relating to said subject, and especially as declared in said acts of May 3, 1852, and April 22, 1858.

Sixth. Because the court decided that said 11th section of said act of March 11, 1850, gave power to said mayor and common council of the city of Los Angeles to enter into said contract of date July 20, 1868, in so far as the same restricted said municipality in regulating water rates and compensation to be charged by the parties of the second part to said contract and their successors in interest for water supplied to said city and its inhabitants, whereas authority to so provide was not fairly deducible from said act or necessary to the general power given of providing for supply-
264 ing said city with water, and nothing contained in said act shows an intention on the part of the legislature to deprive said State of its sovereign power of regulating such water rates and compensation, to be exercised in such manner as said State should thereafter by its constitution or statutes determine.

Seventh. Because the court decided that the bill of complaint stated a case or contained any matter of equity entitling the complainants or any of them to any relief against these appellants or any of them, whereas if the contract set forth in said bill is valid

so far as concerns the provision purporting to restrict the mayor and common council of the city of Los Angeles in regulating water rates, and had the effect of preventing the State of California, through its constitution or its legislature, from reducing the water rates to be charged by the parties of the second part to said contract and their successors in interest below those which were charged by said parties of the second part at the date of said contract, then the ordinance fixing water rates sought to be annulled is void on its face, and should operate in nowise to injure said complainants or any of them, and it does not appear from said bill of complaint that any act had been done or attempted or intended to be done by said city of Los Angeles to prevent said Los Angeles City Water Company from collecting such water rates as it was entitled to collect under the provisions of said contract, nor does it appear from said bill that said city of Los Angeles was interfering with any of the property of said complainants or any of them or otherwise attempting to enforce any of the provisions of said ordinance, nor does it appear from said bill of complaint that said ordinance applied to said Los Angeles City Water Company if said company was exempted from the operation thereof by reason of said contract; and it appears from said bill of complaint that at least one corporation, to wit, the East Side Spring Water Company, was at the time of the adoption of said ordinance engaged in supplying the inhabitants of a
265 portion of said city with water, and said last-mentioned company was not exempted from regulation by virtue of said contract, and it does not appear from said bill of complaint but that other corporations and persons were at the time of the adoption of said ordinance engaged in supplying water to the inhabitants of said city of Los Angeles; which said corporations and persons were not exempted from the regulation with respect to water rates by virtue of said contract.

Eighth. Because the court decided that complainants had not an adequate remedy at law, whereas it appeared that no irreparable injury could result to said complainants, or any of them, by reason of said last-mentioned ordinance, but, on the contrary, complainants had a full and adequate remedy at law for the enforcement of all of their rights with regard to the collection of water rates under and by virtue of the provisions of said contract, and *ss* it does not appear from said bill of complaint that a multiplicity of actions or any action would have been required to enforce the rights of complainants to collect the water rates which they were entitled to collect by virtue of the provisions of said contract.

Ninth. Because the court decided that said bill of complaint stated a case and contained matter of equity entitling the complainants to relief against said city of Los Angeles, whereas said bill did not state a case against said city, inasmuch as said last-mentioned ordinance was not passed by said city of Los Angeles as a legislative act, but was passed by the council of said city in obedience to the requirement of the constitution of said State, and therefore said city of Los Angeles was in nowise concerned in or responsible for said ordinance *of* the water rates therein purported to be established.

Tenth. Because the court decided that the complainant Los Angeles City Water Company was not bound by the provisions of the constitution of the said State with relation to the fixing of water rates, whereas said company was bound by said provisions,
266 inasmuch as it appeared that said company was incorporated under and by virtue of the provisions of said act entitled "An act to provide for the incorporation of water companies," approved April 22, 1858, and had no other rights than those given by said act and the other statutes of said State; which said act and all of said statutes were by virtue of the constitution of said State in force at the time of the incorporation of said company subject to amendment by said State, either through its legislature or its constitution, and said act and other statutes were by article XIV of the constitution of said State adopted on the 3rd day of March, 1879, and ratified by vote of the people of said State on the 7th day of May, 1879, so amended that the council of said city was thereafter given power to regulate the rates and compensation for water furnished to said city and its inhabitants by said company, subject only to the implied condition that such rates and compensation should be reasonable; and it appears from said bill of complaint and the evidence that said company was incompetent to take or hold a contract which had the effect of preventing said State from reducing the rates and compensation for water furnished to the inhabitants of said city below those which were charged by the parties of the second part to said contract at the time of the execution thereof.

Eleventh. Because the court decided that the council of said city had no authority to pass said last-mentioned ordinance, whereas said council did have such authority, inasmuch as said council was required by the constitution of said State to pass said ordinance, and said council could not refuse to do so by reason of the fact (if the same existed) of said Los Angeles City Water Company being exempted from regulation with regard to water rates, and said council had no authority to make said ordinance applicable to any particular persons or corporations supplying water to the inhabitants of said city, but was required by the constitution of said State to make said ordinance general.

267 Twelfth. Because the court decided that said last-mentioned ordinance was wholly invalid, whereas it appears from the pleadings and evidence that said city of Los Angeles, as it existed at the time of the passage of said ordinance, included large portions of territory, amounting to from ten to fifteen square miles, which were not embraced within the limits of said city as the same existed either in the year 1868 or in the year 1870, and that said Los Angeles City Water Company was engaged in supplying water to the in-abitants of said additional portions of territory, and said contract of date July 20, 1868, did not apply to said additional portions of territory nor prevent said State through its legislature or constitution from regulating rates to be charged by said company for water supplied to such additional territory.

Thirteenth. Because the court decided that said mayor and com-

mon council of the city of Los Angeles had authority to enter into said contract of date July 20, 1868, so far as the same had the effect of granting a franchise for constructing and operating water works, and for using the streets and other public places of said city for the purpose of laying pipes and other water works therein, and for collecting rates for water supplied to the inhabitants of said city, whereas said municipality did not have such authority, inasmuch as the only authority claimed by complainants is said 11th section of said act of March 11, 1850; which said section did not have the effect of conferring such power, but only authorized said mayor and common council of the city of Los Angeles to contract with such individuals or corporations which might have acquired such franchise from the sovereign power of the State.

Fourteenth. Because the court decided that the mayor and common council of the city of Los Angeles had power to enter into said contract of date July 20, 1868, in so far as the same provided that said mayor and common council of said city of Los Angeles should not reduce water rates below those charged by the parties
268 of the second part thereto at the time of the execution thereof, whereas said municipality had no such power, inasmuch as if said mayor and common council of the city of Los Angeles then had authority to regulate the rates and compensation for water supplied to its inhabitants, neither such municipality nor its common council could by any contract or otherwise surrender such power, but was bound to retain such power unimpaired and to transmit it to its successors; but if said municipality or its common council did not have authority to regulate such water rates, then it could enter into no contract by which the State of California or said municipality or its council, by power thereafter to be given by said State, would be deprived of the right to regulate such water rates.

Fifteenth. Because the court decided that said mayor and common council of the city of Los Angeles had authority to execute said contract of date July 20, 1868, in so far as the same prevented said municipality from reducing water rates below those which were charged by the parties of the second part to said contract at the time of the execution thereof, whereas said municipality had no such authority, inasmuch as said provision (if the same be held to fix said water rates so charged at the time of the execution of said contract by the parties of the second part thereto as minimum rates, without regard to the fact whether such rates are reasonable or not) establishes an arbitrary standard of rates, without regard to their reasonableness, and was not authorized by the laws of the State of California in existence at the time of the execution of said contract, but was contrary to such laws and the policy thereof and contrary to public policy.

Sixteenth. Because the court decided that said provision of said contract purporting to prevent said mayor and common council of the city of Los Angeles from reducing water rates below those which were charged by the parties of the second part to said contract at

the time of the execution thereof had the effect of preventing the State of California, either through its legislature or
269 its constitution, from providing for the regulation of such water rates, or from authorizing the council of said municipality to regulate such water rates without regard to the provisions of said contract, whereas said contract, properly construed, did not purport to restrict said State in any way from exercising its sovereign power of regulating said rates, and said provision had reference only to said municipality, and did not apply to the council of said city, acting under and by virtue of said article XIV of said constitution, and it appears from the pleadings and evidence that said provision was inserted by reason of the fact that said municipality was leasing its water works to said parties of the second part, and that the right of regulating the water rates was (subject to said provision against the reduction of the same) reserved by said municipality as landlord and as a right arising out of its ownership of said water works, and such reservation was not made by virtue of any governmental power vested in such municipality by the laws of said State to regulate the rates and compensation for supplying water to the inhabitants of said city by persons or corporations not using the water works belonging to said municipality.

Seventeenth. Because the court decided that the rates fixed by said last-mentioned ordinance were less than those charged by the parties of the second part to said contract of date July 20, 1868, at the time of the execution thereof, whereas there was no evidence to show what rates were charged by said parties of the second part at the time of the execution of said contract, and especially there was no evidence to show that many of the uses for which rates were authorized to be charged by said ordinance existed at the time of the execution of said contract, and the only evidence which was introduced by complainants for the purpose of showing what water rates were charged by said parties of the second part at the time of the execution of said contract was the reports of committees
270 of the common council — said municipality made long after the execution of said contract, which evidence was hearsay and did not establish any of the facts stated in said reports; nor did said reports show in fact that the rates therein mentioned or any of them were those charged by said parties of the second part on or before the 23rd day of July, 1868, and the evidence was insufficient to establish the fact that the rates mentioned in said ordinance or any of them were less than those charged by said parties of the second part at the time of the execution of said contract.

Eighteenth. Because the court decided that the complainants were damaged by the reduction of any of the rates charged by said parties of the second part to said contract, of date July 20, 1868, whereas the evidence showed that said last-mentioned ordinance allowed said complainant, Los Angeles City Water Company, to collect rates and compensation for water furnished for many purposes and uses besides those for which said parties of the second part to said contract charged and collected rates and compensation at the time of the execution of said contract, and it did not appear

from the evidence but that such additional rates and compensation exceeded the loss which said Los Angeles City Water Company might have sustained by reason of the reduction of the rates and compensation which said mayor and common council of the city of Los Angeles bound itself in and by said contract not to reduce, and it did not appear from the evidence but that said Los Angeles City Water Company would have received in the aggregate for rates and compensation authorized to be charged and collected by said ordinance a sum in excess of that which said company would have collected had said company been authorized by said ordinance to collect only the rates and compensation which said mayor and common council of the city of Los Angeles bound itself in and by said contract not to reduce.

Nineteen. Because the court decided that said Los Angeles City Water Company was authorized, under and by virtue of the
271 provisions of said contract of date July 20, 1868, to collect water rates and compensation irrespective of the fact as to whether or not they were reasonable, whereas it appears from the pleadings and the evidence that said contract, properly construed, prohibited the reduction by said municipality of rates below those charged by the parties of the second part to said contract at the time of the execution thereof, only on condition that such minimum rates should be reasonable, and it appeared from the evidence, and there is no allegation to the contrary in the bill of complaint, that the rates which were allowed by said last-mentioned ordinance were reasonable, and that the same afforded to said Los Angeles City Water Company a reasonable and an immense interest upon the investment of said company over and above the cost and expense of delivering water to the inhabitents of said city.

Twentieth. Because the court decided that said contract of date July 20, 1868, was a reasonable one and was a reasonable exercise of the power given to said mayor and common council of the city of Los Angeles in and by the 11th section of said act of March 11, 1850, whereas said act gave said municipality the power to pass reasonable by-laws and ordinances, and the ordinance under which said contract was adopted and said contract itself were unreasonable, so far as they gave to said parties of the second part to said contract (if they had that effect) the right to collect unreasonable water rates.

Twenty-first. Because the court decided that said complainant, Los Angeles City Water Company, had not violated the provisions of said contract of date July 20, 1868, prohibiting the parties of the second part to said contract from taking from the Los Angeles river for the use of said water works leased by said contract more than ten inches of water without the previous consent of the mayor and common council of said city and prohibiting said parties of the second part from taking from said river any water except
272 that which might be necessary for domestic purposes, as specified in said contract, whereas the evidence showed that ever since the 20th day of October, 1896, up to and including the hearing of this cause, said Los Angeles City Water Company had

continuously taken from said Los Angeles river, at a point above the northern boundary of said city, a quantity of water varying from 400 to 1,000 inches, measured under a four-inch pressure, for the purpose of distributing and selling the same in said city, and that such taking of said water (so far as related to the excess over ten inches of water, measured under a four-inch pressure) was not only not taken with the consent of said city of Los Angeles, but said water was taken against the express prohibition of said city; and it appeared from the evidence that the ten inches of water mentioned in said contract, either meant ten inches of water measured under a four-inch pressure, or that said term was meaningless, and therefore that said Los Angeles City Water Company had no right under said contract to take any water from said river without the consent of said city.

Twenty-second. Because the court decided that the city of Los Angeles, either while existing under the name of the mayor and common council of the city of Los Angeles or under the name of the city of Los Angeles, had ever given its consent to the taking of more than ten inches of water, measured under a four-inch pressure, by said Los Angeles City Water Company, whereas there was no evidence to show that such consent was ever given; but, on the contrary, it appeared that said Los Angeles City Water Company took all the water which was ever taken by it from said river without asking or obtaining the consent of said city, and that such taking of said water by said company ever since the 6th day of June, 1879, was in direct violation of an ordinance of said city duly passed and approved on said date.

Twenty-third. Because the court decided that said city of Los Angeles was estopped to withdraw its consent on the 20th day of October, 1896, to said Los Angeles City Water Company's
273 taking water from said river in excess of said quantity of ten inches, measured under a four-inch pressure, whereas the evidence was insufficient to show such estoppel, as it appears from the bill of complaint and the evidence that the parties of the second part to said contract and their successors in interest were obligated to construct works sufficient to supply the inhabitants of said city with water during the term of thirty years from the execution of said contract, irrespective of the fact of whether or not they would be able to obtain a sufficient supply, and they were bound in and by said contract not to take any water from said river in excess of the quantity of ten inches therein specified unless said municipality should consent thereto, and said parties of the second part and their successors in interest would have forfeited their rights under said contract had they failed to construct said works, and therefore said works were not constructed by said Los Angeles City Water Company on the faith of any implied permission of said city to use the water of said river free and without charge, but, on the contrary, said company was by said contract obligated to procure water elsewhere in case said city should at any time during the period of said contract refuse to allow said company to take water from said river in excess of said quantity of ten inches, and the evidence was in-

sufficient to show any element of estoppel against said city's withdrawing its consent to the use of the water of said river in excess of said quantity of ten inches, nor was said city ever authorized to give a consent which it could not withdraw at pleasure.

Twenty-fourth. Because the court decided that said ordinance sought in said bill of complaint to be annulled had the effect of reducing water rates below those which were charged by the parties of the second part to said contract at the time of the execution thereof, whereas there was no evidence to show such reduction,

but appeared from the evidence and the pleadings that said
274 Los Angeles City Water Company was charging and collecting said rates not only for the use of its water works and of water controlled by it, but also for the use of water taken from said Los Angeles river in violation of the terms of said contract, which last-mentioned water belonged to said city of Los Angeles, and it therefore appeared from the evidence that said water rates specified in said ordinance were based not only on the value of the water works constructed by said company, but also upon the value of the water belonging to said city, which was being taken and used by said company for the purpose of supplying the inhabitants of said city.

Twenty-fifth. Because the court decided that the complainant Los Angeles City Water Company had not waived the right and estopped itself to object to the reduction of water rates by said council of said city below those charged by the parties of the second part to said contract of date July 20, 1868, whereas the evidence showed such waiver and estoppel, as it appeared from the evidence that in each year ever since and including the year 1880 up to and including the year 1895 the council of said city, in obedience to the requirements of said article XIV of the constitution of said State and in pursuance of the act of the legislature of said State entitled "An act *th* enable the board of supervisors, town council, board of aldermen, or other legislative body of any city and county, city or town, to obtain data and information from any corporation, company, or person supplying water to such city and county, city or town, requiring such boards, town council, or other legislative body to perform the duties prescribed by section 1, of article XIV, of the constitution, and prescribing the penalties for the non-performance of such duties," approved March 7, 1881, had established water rates and compensation to be collected by any person or corporation supplying water to the inhabitants of said city, which rates and
275 compensation so fixed by said council were less than those alleged in the bill of complaint to have been charged by said parties of the second part to said contract at the time of the execution thereof, and that said complainant, Los Angeles City Water Company, did not at any time do any act or thing to prevent said council from so fixing said water rates and compensation, but always acquiesced in the action of said council in so fixing said water rates and compensation, and that during all of said time said company went on taking water from the Los Angeles river in excess of the quantity of ten inches mentioned in said contract, and collected

the water rates and compensation so fixed by said council and no others, and that by reason of such acquiescence and said action of said company it became and was estopped to question the right of said city and of its council after said year 1895 to fix and establish reasonable rates and compensation for water to be furnished to the inhabitants of said city by said company, and the claim of said complainants was at the time of filing their bill of complaint stale and not entitled to consideration by a court of equity; and that said company in each year from and including the year 1882 up to and including the year 1897, in pursuance of said act of March 7, 1881, furnished to said council of the city of Los Angeles a detailed statement showing the name of each water-rate payer, his or her place of residence, and the amount paid for water by each of said water-rates payers during the year preceding the date of such statement, and also showing the revenue derived from all sources and the expenditures made for supplying water during said time, thereby submitting said company to the jurisdiction of said council in regard to the fixing of water rates and compensation to be charged by said company and waiving any right which might have been conferred by said contract to object to said council exercising jurisdiction over said company with regard to the fixing of said water rates.

276 Twenty-sixth. Because the court decided that said contract of date July 20, 1868, so far as it provided that said mayor and common council of the city of Los Angeles should not reduce water rates below those charged by the parties of the second part to said contract at the time of the execution thereof was validated or confirmed by the act of the legislature of said State entitled "An act to ratify certain acts and ordinances of the mayor and common council of the city of Los Angeles," approved April 2, 1870, whereas said contract was not validated or confirmed by said act, as it appeared from the pleadings and the evidence that at the time of the passage and approval of said act said contract had been assigned to the complainant, Los Angeles City Water Company, and was then held by said company, and said act was therefore void as being in conflict with section 31 of article IV of the constitution of said State, in force at the time of the passage and approval of said act, providing that corporations should not be created by special act, and the effect of said act would have been to create a private corporation within the rule of decision of the supreme court of said State, and the evidence showed that at the time of the execution of said contract the parties of the second part thereto obtained the same for the benefit of themselves and certain associates with the intention of forming a water company under said act of April 22, 1858, for the purpose of carrying out said contract, and said Los Angeles City Water Company was accordingly formed by said parties of the second part and their said associates in the following month of August, 1868, and said company thereupon commenced the construction of the works required in and by said contract to be constructed, and did all of the acts and things which were ever done in performance of the obligations of said parties of the second part and their suc-

cessors by the terms of said contract, and said parties of the
276½ second part did nothing individually in performance of said contract, and said contract in truth and fact was obtained for said Los Angeles City Water Company, which was in contemplation of formation at the time of the execution of said contract, and there never was any intention on the part of said parties of the second part to individually carry out or perform any of the terms of said contract.

Twenty-seventh. Because the court decided that said contract of date July 20, 1868, did not come within the terms of said act of March 3, 1852, whereas said contract did come within the terms of said act, as it appears from the evidence that the parties of the second part to said contract obtained the same for the benefit of themselves and certain associates, with the intention of forming a water company under said act of April 22, 1858, and the other statutes of said State for the purpose of carrying out and performing the terms of said contract, and that said complainant, Los Angeles City Water Company, was accordingly formed by said parties of the second part and their said associates in the month of August, 1868, for the purpose of carrying out and performing the terms of said contract, and that said company upon its formation proceeded to construct and did construct the works required in said contract to be constructed by said parties of the second part and performed and did all the acts and things which were ever done in performance of the obligations of said parties of the second part and their successors, and that said parties of the second part individually did no act or thing in performance of said contract, and that said company ever since its incorporation has held said contract and said parties of the second part have no interest therein.

Twenty-eighth. Because the court decided that the complainants were entitled to relief herein, whereas complainants were not entitled to any relief herein, as it appears from the bill of complaint that the term of said contract of date July 20, 1868, would
277 have expired before any decree in said cause could have become final, and therefore said complainant, Los Angeles City Water Company, would not have been protected by any decree herein in collecting any higher water rates and compensation than those prescribed by said ordinance in said bill of complaint sought to be annulled to any greater extent than it would have been had this suit not been brought.

Twenty-ninth. Because the court decided that it had jurisdiction of this cause, whereas it had no such jurisdiction, as the only ground of such jurisdiction claimed in said bill of complaint is that the adoption of said ordinance sought in said bill to be annulled had the effect of impairing the obligation of said contract of date July 20, 1868, in so far as the same inhibited the mayor and common council of the city of Los Angeles from reducing water rates below those charged by the parties of the second part to said contract at the time of the execution thereof, and no act or thing had been done by the appellant The City of Los Angeles or by its council, or by any of its officers, agents, or employees, in enforcing the provisions

of said ordinance, nor had the property of the said Los Angeles City Water Company been interfered with in any wise by said city or by its council or by any of its officers, agents, or employees, and said company had received no damage in fact and was threatened with no damage, irreparable or otherwise, and no real controversy concerning the impairment by the State of California of the obligation of said contract had arisen between the complainants or any of them and the appellants herein or any of them, and this suit is not one arising under the Constitution of the United States, according to the true intent and meaning of an act of the Congress of the United States entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes," approved March 3, 1875, or any other act of the Congress of the United States conferring jurisdiction upon circuit courts of the United States.

278 Thirtieth. Because said decree adjudges that said contract of date July 20, 1868, in so far as it provides that the city should not reduce the water rates below those charged on the date of said contract, is valid, whereas said contract, in so far as said provision is concerned, is invalid.

Thirty-first. Because said decree adjudges that the ordinance sought in the bill of complaint to be annulled did reduce the water rates below those charged on the date of said contract, whereas said ordinance did not so reduce said water rates.

Thirty-second. Because said decree adjudges that the ordinance sought in said bill of complaint to be annulled impaired the obligation of said contract, whereas said ordinance did not impair the obligation of said contract.

Thirty-third. Because said decree adjudges the ordinance sought in said bill of complaint to be annulled to be null and void, whereas said ordinance was not null or void, but was valid in all respects.

Thirty-fourth. Because said decree adjudges that the ordinance sought in said bill of complaint to be annulled should be vacated and set aside and held for naught, whereas said decree should have adjudged that said ordinance was valid and binding on the complainants and each of them, and the bill of complaint does not pray that said ordinance be vacated or set aside or held for naught, and there is no allegation in the bill upon which to base such relief.

Thirty-fifth. Because said decree enjoins and restrains appellants herein during the existence of said contract from fixing water rates to be charged by the Los Angeles City Water Company at any less amount than those charged by J. S. Griffin, P. Beaudry, and Solomon Lazard at the time of the execution of said contract, whereas said decree should not have enjoined or restrained said appellants or any of them or the council of said city of Los Angeles

279 from fixing water rates to be charged by said Los Angeles City Water Company at a less amount than those charged by said Griffin, Beaudry, and Lazard at the time of the execution

of said contract, and said bill of complaint did not pray that such injunction or restraint should be decreed by said court during the existence of said contract, but only until the determination of said contract, and there was no allegation in said bill upon which to base said relief.

Wherefore said appellants pray that said decree be reversed, and that said circuit court be directed to enter a decree dismissing the complainants' bill of complaint.

LEE & SCOTT,
W. E. DUNN,
ALBERT CRUTCHER,
Solicitors for Appellants.

(Endorsed:) Eq. No. 734. U. S. circuit court, so. dist. of California. Los Angeles City Water Co. *et al. vs.* City of Los Angeles *et al.* Assignment of errors on appeal. Received copy of within assignment this 7th day of Sept'r, 1898. White & Monroe & J. S. Chapman, sol'rs for respondents. Filed Sep. 7, 1898. Wm. M. Van Dyke, clerk. W. E. Dunn, A. Crutcher, Lee & Scott, rooms 411–414 Bullard block, Los Angeles, California, solicitors for appellants.

280 At a stated term, to wit, the August term, A. D. 1898, of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, held at the court-room, in the city of Los Angeles, on Wednesday, the seventh day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Olin Wellborn, district judge.

Los Angeles City Water Company, Crystal Springs Land and Water Company, and S. G. Murphy, Complainants, *vs.* The City of Los Angeles, Herman Silver, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, Composing the Council of the City of Los Angeles, Defendants.	No. 734.

On motion of J. R. Scott, Esq., of counsel for the defendants in said cause, it is ordered that the appeal of the said defendants from the order and decree made and entered on the 20th day of June, 1898, in the above-entitled cause to the Supreme Court of the United States be, and the same hereby is, allowed, and that a transcript of the record, pleadings, papers, and proceedings upon which said order and decree was made, duly authenticated, be sent to the said Supreme Court of the United States; it is further ordered that the

said appeal be, and the same hereby is, made returnable before the said Supreme Court of the United States on the 10th day of
281 October, 1898; it is further ordered that the bond on appeal, in the sum of five thousand (5,000.00) dollars, tendered by said defendants be, and the same hereby is, approved.

282 In the Circuit Court of the United States, Ninth Circuit, Southern District of California. In Equity.

LOS ANGELES CITY WATER COMPANY ET AL., Complainants,
vs.
CITY OF LOS ANGELES ET AL., Defendants. } No. 734.

Know all men by these presents that we, The City of Los Angeles, Herman Silver, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchinson, F. M. Nickell, and F. L. Baker (composing the council of the city of Los Angeles), as principals, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the complainants, Los Angeles City Water Company, Crystal Springs Land and Water Company, and S. G. Murphy, in the full and just sum of five thousand dollars, to be paid to said complainants, their certain attorneys, executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, successors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately at a circuit court of the United States for the southern district of California, in a suit depending in said court between Los Angeles City Water Company, Crystal Springs Land and Water Company, and S. G. Murphy, complainants, and The City of Los Angeles, Herman Silver, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchinson, F. M. Nickell, and F. L. Baker, composing the council of the city
283 of Los Angeles, defendants, a decree was rendered against the defendants, and said defendants having obtained an appeal and filed a copy thereof in the clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to said complainants, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 10th day of October next:

Now, therefore, the condition of the above obligation is such that if the said defendants shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good,

the above obligation to be void; else to remain in full force and virtue.

HERMAN SILVER. [SEAL.]
Z. D. MATHUSS. [SEAL.]
L. M. GRIDER. [SEAL.]
JAMES ASHMAN. [SEAL.]
CHAS. H. TOLL. [SEAL.]
EDWARD L. HUTCHISON. [SEAL.]
E. L. BLANCHARD. [SEAL.]
F. M. NICKELL. [SEAL.]
FRED L. BAKER. [SEAL.]
CITY OF LOS ANGELES, [SEAL.]
By M. P. SNYDER, *Mayor*. [SEAL.]

[Seal of Fidelity & Deposit Co.]

FIDELITY & DEPOSIT CO.
OF MARYLAND,
By E. G. MOSSIN,
A Member of the Local Board of Directors of said Company.

Attest: W. E. McVAY, *Agent*.

Sealed and delivered in the presence of—
——— ———.

[63 cents internal-revenue stamps.]

284 (Endorsed:) Eq. No. 734. Dept. Orig. U. S. circuit court, State, so. dist. of California. Los Angeles City Water Co. *et al. vs.* City of Los Angeles *et al.* Bond on appeal. Approved, Olin Wellborn, judge. Filed Sep. 7, 1898. Wm. M. Van Dyke, clerk. Lee & Scott, rooms 411–414 Bullard block, Los Angeles, California, solicitors for appellants.

285 In the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS Land & Water Company, and S. G. Murphy, Complainants,
vs.
THE CITY OF LOS ANGELES, HERMAN SILVER, Z. D. Matthuss, L. M. Grider, E. L. Blanchard, C. H. Toll, James Ashman, E. L. Hutchison, F. M. Nickell, and F. L. Baker, Composing the Council of the City of Los Angeles, Defendants. } No. 734.

I, Wm. M. Van Dyke, clerk of the circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, do hereby certify the foregoing two hundred and eighty-four (284) typewritten pages, numbered from 1 to

284, inclusive, and comprised in one volume, to be a full, true, and correct copy of the record, pleadings, papers, opinion of the court, assignment of errors, and of all proceedings in the above and therein entitled cause, and that the same together constitute the transcript of the record on appeal to the Supreme Court of the United States in said cause.

I do further certify that the cost of the foregoing record is $185.45, and that the amount thereof has been paid me by The City of Los Angeles, one of the appellants in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court of the United States of America of the ninth judicial circuit in and for the southern district of California, this 30th day of September, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-third.

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Seal U. S. Circuit Court, Southern Dist. Cal., 1886.

WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

[10 cent U. S. internal-revenue stamp, canceled Sep. 30, 1898. Wm. M. Van D.]

Endorsed on cover: Case No. 17,014. S. California C. C. U. S. Term No., 148. The City of Los Angeles, Herman Silver, Z. D. Matthuss, *et al.*, appellants, *vs.* Los Angeles City Water Co., Crystal Springs Land & Water Company, and S. G. Murphy. Filed October 10th, 1898.

8110

IN THE

SUPREME COURT

OF THE

UNITED STATES

The City of Los Angeles, et al.,

Appellants,

vs.

Los Angeles City Water Company, et al.,

Appellees.

BRIEF FOR APPELLANTS.

This is an appeal from a decree rendered in favor of the appellees who were the complainants in the court below, which decree set aside and declared null and void an ordinance passed by the council of the appellant, City of Los Angeles, establishing water rates to be collected by all persons and corporations supplying water for domestic purposes to the inhabitants of the city for the year beginning July 1st, 1897.

The complainants relied, and the decree was wholly based, on a contract which had been entered into on July 22nd, 1868, between the City

of Los Angeles (under its then corporate name of the Mayor and Common Council of the City of Los Angeles), and the assignors of the complainant, Los Angeles City Water Company, who were John S. Griffin, Prudent Beaudry and Solomon Lazard; it being claimed by complainants, and held by the court below, that a certain provision of this contract had the effect of preventing the reduction of water rates below those which were being charged at the time of the execution of the contract, whether such reduction should be made by the City itself or by the State or any of its agents.

The contract in question (which is set forth in folios 3–9 of the Transcript of Record), does not contain a schedule of charges, but merely refers in general terms to the rates which were being collected by the lessees (as we shall hereafter style the assignors of the Los Angeles City Water Company), at the date of that contract or lease, whatever the instrument may be termed; and the bill of complaint set forth a schedule of rates, which, it is alleged, were those that were being charged by the lessees in July, 1868, and the court so finds.

The answer denied this allegation; and the assignments of error attack the finding of the court against this denial on the ground of insufficiency of the evidence to sustain it. [Assignment 17, Record fols. 269–270.]

At the time that the contract was entered into, the City was the owner of its own system of water works for supplying water to its inhabitants for domestic uses; and it was also the owner of the paramount right to the use of the waters of a stream which flowed through the City, called the Los Angeles river, by virtue of the laws of Spain and Mexico which accorded the Pueblos established by those governments the right to water courses which flowed through or along the land of such Pueblos.

The right of the City, as successor of the ancient Spanish and Mexican "Pueblo de Nuestra Senora Reina de Los Angeles," (which, translated, means Town of our Lady Queen of the Angels), has been established in a series of suits, beginning with Elms v. Los Angeles, 58 Cal. 80, and ending with City of Los Angeles v. Pomeroy, 124 Cal. 597.

In the first case it was held (without passing upon the rights of the Pueblo under the laws of Spain and Mexico), that the City, by virtue of the possession and user by itself and its predecessor, the Pueblo, ever since the establishment of the town in 1781, had become the owner of the paramount right to the use of all of the waters of the river, to the extent of its needs, and of the right of controlling and managing the user of the surface waters by the riparian proprietors above.

In the subsequent case of Vernon Irrigation Company v. Los Angeles, 106 Cal. 237, it was decided that, under the laws of Spain and Mexico, the Pueblo was the owner of the same paramount right, and that the City, as its successor, had become vested with it.

In City of Los Angeles v. Pomeroy, *supra*, this doctrine was reaffirmed, and the rights of the City were held to extend to the underflow as well as to the surface stream.

The contract in question recognizes this right in the City by several provisions, referring to the use of the river water and hereinafter quoted.

From the recitals of the lease, it also appears that the lessees were then operating the waterworks therein demised, having, in fact, acquired the rights of the lessees in a former lease of the same property previously made by the City. By this contract or lease, (or rather, contract containing a lease, for the instrument partakes of the nature of both a demise of waterworks and water, and a grant of a franchise and easements), the City purports to agree to deliver and concede to the other parties, or their assigns, the exclusive use, control, possession and management of the Los Angeles city waterworks, and all works and other personal property composing and appertaining thereto, for the term of thirty years from the approval of the contract,

with the right to sell and distribute water for domestic purposes and to receive the rents and profits thereof for their own use and benefit, including the right to lay pipes in the streets and the right of way over the lands of the City, "with the additional right to take water from the Los Angeles river at a point above or near the present dam, provided always that the said parties of the second part, their heirs, executors, administrators or assigns, shall at no time take from the said river, for the use of said waterworks, more than ten inches of water, without the previous consent of the Mayor and Common Council of said City;" it being provided that the City would, at the expiration of the thirty years, pay to the other parties, or their successors, the value of the improvements made to and upon the waterworks; and it was further provided that, "the said party of the first part hereby covenants and agrees to make no other lease, sale, contract, grant or franchise to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said City for domestic purposes during the continuance of this contract;" and it was also provided, "that the Mayor and Common Council of said City shall have, and do reserve the right to regulate water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water

rates or so fix the price thereof to be less than those now charged by the parties of the second part for water;" and it was further declared that "the rights and privileges by these presents conceded to the party of the second part do not embrace to any extent or have any reference to the waterworks of said City, used for the distribution of water for the purpose of irrigation, or affect in any manner any rights of irrigation either existing at present or which may exist hereafter, excepting as to the ten inches of water as hereinbefore provided. And it is expressly stipulated and covenanted that said parties of the second part shall not dispose of any water for the purpose of irrigation, but shall only take from said river the water necessary for domestic purposes as above specified."

The second parties, by the contract, agreed to pay yearly $1500.00, and to cancel certain claims which they made against the City for repairs of the water works, and also to make certain improvements on the works including certain water pipe and hydrants, and also to erect a certain fountain in the Plaza, and also to construct such other works as would secure to the inhabitants a constant supply of water for domestic purposes; and they also agreed to furnish water for certain public purposes free of charge, and to return the waterworks to the City at the

expiration of the term upon payment of the value of the improvements; and they further bound themselves to surrender to the City a certain outstanding lease of the same waterworks which had previously been made to another party.

The contract also purported to cede to the lessees "all the rights, easements and privileges, and covenants as described and contained in a certain instrument of lease" made in 1865 by the City to one Jean L. Sansevaine; (being the lease which the lessees had obtained the assignment of, as already explained), but the bill of complaint fails to set out this lease, so that we are ignorant of its terms so far as shown by the record. [Record folio 5.]

The bill in addition to alleging the matters hereinbefore recited, averred that the contract had been assigned to the Los Angeles City Water Company prior to April 19th, 1870, and the proof showed that this assignment occurred June 12th, 1869. [Record folios 190–2.]

It is also averred that the Los Angeles City Water Company had done all of the work required by the contract to be performed, and had expended more than $2,000,000.00, (Record folio 10); but the evidence showed that up to October 1896, the Company had collected $4,228,000.00 and would, at the same rate, collect, by the end of the thirty years term, the further sum

of $750,000.00, making an aggregate of about $5,000,000.00, and that no assessments had been levied on the stockholders in excess of $79,500.00. [Record fols. 243–258.]

The rates for the year ending Nov. 1st, 1896, amounted to $422,220.46, and the other receipts brought the amount up to the gross aggregate of $439,971.79. [Record fol. 257.]

What the receipts amounted to, for the year in which the rates, established by the ordinance in question, were collected, does not appear, but the increase of rates for the last three years ending Nov. 1st, 1895, was as follows: 1892–3, $275,569; 1893–4, $345,691.64; and 1894–5, $392,636.82. [Record fols. 245–6.]

The bill further charges that the ten inches of water secured by the contract was subsequently found not to be sufficient, and that a new company, the Crystal Springs Land and Water Company, (which is also a complainant), was incorporated, and that the Los Angeles City Water Company thereupon conveyed to the new Company a tract of land which the former had purchased for a water supply, and that thereupon this Crystal Springs Land and Water Company proceeded to develop a certain amount of water upon this land, and upon other lands, which developed water was brought down in conduits to connect with the distributing plant of the Los Angeles City Water Company,

and that a lease was made to the latter company by the other one of these waters at a rental of twenty-five per cent of the gross rates collected for sale of water in the City. [Record fols. 13–14].

The evidence, however, showed that this new company was organized by the stockholders of the old corporation, and that the rental agreed to be paid under the lease, was forty per cent instead of twenty-five per cent, though this is probably immaterial as the bill does not attempt to claim that the rates are unreasonable. [Record fols. 217, 223–4.]

The object of forming this new corporation was probably two fold; firstly, to construct the headworks in the name of a company which was not a party to, nor the successor in interest of the lessees in the contract of 1868, so that the City, at the end of the term of the lease, would not have any headworks with which to supply the distributing system; and, secondly, to go through the form of taking the revenues out of one pocket and putting them in another in the shape of a rental, so as to increase the apparent expenses of supplying water to the City, and thereby justifying higher rates.

The bill also alleges that, in 1870, some dispute having occurred with reference to the rates which were being charged at the date of the contract, a committee was ap-

pointed by the Council to ascertain what those rates were, and that such committee reported a schedule of rates which was adopted by the Council as being those which should be charged by the Los Angeles City Water Company under the contract; and this schedule is set forth. [Record fols. 17–19.]

There was no evidence, except the report of this committee, introduced for the purpose of showing what the rates in 1868 were. [Record fols. 199–205.]

The bill also sets up certain provisions of the Constitution of California, adopted in 1879, and also an Act of the Legislature passed in 1881, prescribing that rates, to be charged by persons and corporations supplying cities and their inhabitants with water, should be annually fixed by the legislative body of such cities [Record fols. 22–5]; and a similar provision of a charter of the City of Los Angeles, adopted in 1889, is also set forth. [Record fols. 255–6.]

It is alleged that these constitutional and statutory provisions impaired the obligation of the contract of 1868, in allowing lower rates to be fixed than those provided in the contract, and especially in providing that any corporation, supplying water to cities, should forfeit their franchise and works if greater rates than those fixed by the Council are collected. [Record fols. 26–7.]

The ordinance in question is set forth, showing that a number of the rates prescribed in the schedule of 1870 are reduced to some extent and in some cases, but also showing that rates are allowed to be charged for a variety of purposes which were not mentioned in the schedule of 1870, and furthermore that, in certain contingencies, higher rates can be charged than those allowed in 1870. [Record fols. 28–31.]

It is averred that the revenues of the Los Angeles City Water Company, under the provisions of the ordinance attacked, will be reduced more than forty per cent. below the amount which would have been received under the contract of 1868. [Record fol. 31.]

It is further charged that the City will attempt to enforce a forfeiture in case the company should attempt to collect higher rates than those fixed by the ordinance. [Record fols. 31–2.]

The answer denies that any agreement was made by the City to the effect that the rates fixed in 1870 were those which were charged by the lessees at the date of the contract, and also denies that the revenues of the company will be at all reduced below those which would have been collected had the rates of 1870 been allowed, and also denies that the City will attempt to enforce a forfeiture.

The bill also sets up a special Act of the Leg-

islature, passed April 2nd, 1870, attempting to ratify the contract of 1868. [Record fol. 20.]

Certain exceptions were taken to portions of the bill, some of which were allowed by the court and others disallowed, but appellants do not insist upon any error with respect to the overruling of such exceptions.

Separate demurrers were interposed to the bill, one by the City, and the other by the members of the Council, who were also made parties, the first on the grounds of want of equity, want of jurisdiction, misjoinder of the City with the members of the Council, and other grounds, which were either included in those already specified or were waived; and the demurrer also set up the same grounds. [Record fols. 40–54]

The evidence consisted of a stipulation of facts which was entered into between the parties, it being provided that the court might take judicial notice of all state statutes. [Record fols. 181–258]

The appellant's assignment of errors is contained in folios 261–279, and may be briefly summarized, so far as concerns those upon which appellants rely, as follows:

1. Error in overruling the demurrer; and that the decree should have been for defendants, as the bill showed that there was no valid contract which prevented the lowering of rates.

2. The City had no power to bind itself by

the contract not to reduce water rates, and that such contract was prohibited by the acts of May 3rd, 1852, and April 22nd, 1858, the former of which prohibited cities from depriving themselves of the power of regulating water rates, and the second of which specifically provided how such water rates should be fixed, and also that such contract was contrary to the policy of the law as shown in those two statutes and other state legislation.

3. That the only statute which complainants claimed to give the City power to make the contract was that of March 11th, 1850; and it was not intended by such act to confer power on the City to deprive the City of its right to regulate water rates.

4. That the bill did not show any equity, as the ordinance, if in violation of the contract, was void on its face, and no act was attempted to be done by the City to enforce its provisions or to prevent the Company from collecting such rates as it was entitled to collect under the contract; and further, that the ordinance did not apply to the complainants if the Company was exempt from its provisions by reason of holding the contract, and also that there were other persons or corporations engaged in supplying water to which such ordinance was properly applicable; and also that the complainants had

an adequate remedy in law to enforce their rights under the contract.

5. That the ordinance in question was not a legislative act of the City, but was passed by the Council as the agent of the State, and that the City was in no wise concerned in nor responsible for the ordinance or rates therein established; and also that the Council had no authority to exempt the Los Angeles City Water Company from the operation of the ordinance, nor to make the rates applicable to any particular corporations supplying water.

6. That the company was bound by the provisions of its own charter, which subjected it to the provisions of the constitution and the act of 1881, requiring rates to be fixed by the Council.

7. That the ordinance applied to the whole City as it existed in 1897, and that from ten to fifteen square miles had been added to the original thirty-six square miles which comprised the City in 1868, and 1870, and that the contract did not apply to such additional territory.

8. That the City had no authority to make any contract with regard to a water supply except with persons or corporations holding a franchise under the State, and that the City itself could not confer a franchise.

9. That the City could not bind itself not to reduce water rates, for, if it had the power to fix

such rates, it could not part with that power, and, on the other hand, if it had no such power, it was not competent to enter into a contract with regard thereto.

10. That the City had no authority to establish a special standard of rates without regard to reasonableness, and that the contract was contrary to public policy.

11. That the contract bound only the City not to lower water rates, and did not apply to the Council acting as the agent of the State under the constitutional provisions, and that the restriction in the contract against lowering water rates applied only to the right which was reserved by the City to regulate rates and had no application to any power with which the City might be vested by the Legislature.

12. That there was no evidence to show what were the rates charged by the lessees at the date of the contract, and that many of the rates allowed by the ordinance in question were for uses which were not charged for at the date of the contract, and that there was no evidence to show that the rates of the ordinance of 1897 were lower than the rates charged in 1868; and further that it did not appear but that the revenues, derived from these additional rates, were sufficient to make up any loss which the Company might have sustained by the reduction of the rates which were in existence in 1868, and

also that there was no evidence to show that the ordinance in question reduced water rates below those which were charged by the lessees at the date of the contract; and also that the Company was collecting rates for the use of water taken by it in violation of the contract.

13. That the contract of 1868 did not have the effect of establishing the rates charged in 1868, if such rates thereafter proved to be unreasonable, and that the rates fixed by the ordinance of 1897 were reasonable; and further that the contract was not a reasonable exercise of the power given to the City by the Act of March 11th, 1850, if the contract authorized the collection of unreasonable rates.

14. That the company had, ever since October 20th, 1896, been violating a provision of the contract which prohibited it from taking more than ten inches of water without the consent of the City; and that there was no evidence to show that the City had ever given its consent to the taking of any water above that quantity; and further that there was no estoppel against the City withdrawing its consent to the taking of any additional water, if such consent was in fact given.

15. That the company had waived its right and was estopped to object to the reduction in rates below those fixed in the contract, by allowing the Council to fix rates from 1880 up to and

including 1895, and by collecting the rates so fixed, although below those claimed to be allowed in the contract, and that the claim of complainants was stale.

16. That the special Act of April 2nd, 1870, purporting to ratify the contract of 1868, was void as being in conflict with the State Constitution prohibiting the creation of private corporations.

17. That the contract of 1868 came within the provisions of the Act of March 3rd, 1852, prohibiting the City from making a contract with a water company by which the City was deprived of its right of regulating water rates, in view of the fact that the lessees in the contract obtained the same for the benefit of themselves and associates with the intention of immediately forming a water company, and of transferring the contract to such company, which was done.

18. That the complainants were not entitled to any relief, because it appeared from the bill that no decree would become final in time to protect complainants in collecting higher rates than those prescribed in the ordinance of 1897.

19. That there was no jurisdiction of the cause for the reason that nothing was being done or threatened to be done by the City to enforce the ordinance in question, nor had the company been interferred with in any way in

collecting the rates fixed by the contract, and there was no real controversy concerning the impairment of the obligation of the contract within the meaning of the Act of Congress of March 3rd, 1875, conferring jurisdiction upon circuit courts of the United States.

20. That the decree adjudged that the ordinance be vacated, set aside and held for nought, without any prayer to that effect in the bill.

The other specifications are formal, and embraced within those already mentioned.

We will now discuss the points raised in the assignment of errors

I.

The Contract Does Not Purport to Bind the State Not to Reduce Rates, But Applies Only to the City in Its Corporate Capacity.

The provision, under which appellees claim immunity from regulation of their rates, is as follows:

"Always provided that *the mayor and common council of said City* shall have, and do *reserve*, the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that *they* shall not so reduce such water rates, or so fix the price thereof to be less than those now charged by the parties of the second part for water."

It will thus be seen that the clause purports

to prohibit only the municipal corporation from reducing rates below those charged by the lessees, and does not in any way attempt to declare that those rates shall not be lowered in any case.

As already remarked, the City was the owner of the water works which were leased by the contract, and as such owner would have had the right to prescribe such rates as it chose to fix, but, it would have had no power, as a municipality and owner of the property, to interfere with the management of the water plant after an absolute lease thereof, unless such power had been expressly reserved.

The term reserve is in fact made use of, and it is clearly apparent that the reservation was made by the City as landlord and owner, and not as a governmental agent of the State.

If the City had the power, as the agent of the State, to regulate charges for water, there was no necessity for inserting a reservation in the contract, and the fact of such insertion clearly shows that the parties supposed that its omission would have left the City without the right.

Here the lessor reserves the right of regulation of rates, and if the contract had stopped there, it would have vested the City with an absolute right not subject to control by the lessees; and in order to prevent the damage which would have resulted by a reduction in

water rates below those which would have afforded the interest upon the investment which the lessees desired to obtain, a *condition* was imposed on the right of regulation.

A somewhat similar reservation in a grant of franchise was construed in Logansport Gas Co. v. Peru, 89 Fed. 85, it being held that the reservation created a new right and was contractual and not legislative.

But it is plain that the restraint on the City in the present contract did not refer to the municipality acting under its legislative powers, if it had any, or to the State in its sovereign right of regulating compensation for the use of property charged with a public interest.

The ordinance establishing rates, which is attacked in the case at bar, was not enacted by the City as a municipality, but was adopted by the Council in pursuance of the requirements of the State Constitution, which enjoined on the Council, (and not on the City), the duty of fixing rates for water supplied to its inhabitants.

This constitutional provision is contained in the Constitution of California, adopted in 1879, and is as follows:

"Article XIV, Section I. The use of all water now appropriated or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use and subject to regulation and control of the State, in the man-

ner to be prescribed by law; provided that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or county, or the inhabitants thereof, shall be fixed annually by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance, or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month or February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action, at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation, to the city and county, or city or town, where the same are collected, for the public use.

Section 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise and may not be ex-

ercised except by authority of and in the manner prescribed by law."

This constitutional provision was supplemented by an Act of the Legislature passed March 7th, 1881 [Statutes of 1881, p. 54], the first section of which is as follows:

"Section 1. The Board of Supervisors, Town Council, Board of Alderman, or other legislative body of any city and county, city or town, are hereby authorized and empowered, and it is made their official duty, to annually fix the rates that shall be charged and collected by any person, company, association or corporation, for water furnished to any such city and county, or city or town, or the inhabitants thereof. Such rates shall be fixed at a regular or special session of such board or other legislative body, held during the month of February of each year, and shall take effect on the first day of July thereafter, and shall continue in full force and effect for the term of one year and no longer."

The State Supreme Court has decided that the ordinance or other act establishing rates is not required to be passed as a legislative act of the municipal corporation, but that it is simply the action of a tribunal to which has been delegated, by the State, the governmental power of adopting regulations of charges made for supplying water to the inhabitants of cities.

Jacobs v. Supervisors, 100 Cal. 121.

It hardly needs a citation of authorities, after the numerous decisions which have been made

by this Court, to show that franchises, of the character of the right in question, are to be strictly construed, and that all intendments are against a private individual or corporation claiming special privileges, and in favor of the State or its agent as not intending to part with any prerogative of sovereignty.

In Minturn v. La Rue, 23 How. (U. S.) 435, the rule was thus expressed:

"It is well settled rule of construction of "grants by the legislature to corporations, "whether public or private, that only such "rights and powers can be exercised under them "as are clearly comprehended within the words "of the act or derived therefrom by necessary "implication, regard being had to the objects of "the grant. Any ambiguity or doubt arising "out of the terms used by the legislature must "be resolved in favor of the public."

The case of Fanning v. Gregoire, 16 How. (U. S.) 524, is one which illustrates this principle very clearly.

There a ferry right had been granted to plaintiff for 20 years across the Mississippi river at the town of Dubuque, and it was provided that no court or board of County Commissioners should authorize any person to keep a ferry within the limits of the town of Dubuque; and afterwards the City of Dubuque, comprising the former town, was incorporated, with power to license and establish ferries across the Miss-

issippi river from the City, and under this power the City granted the defendant the right to keep a ferry between the City and the opposite shore.

The Court mentioned the fact that the license to plaintiff ran to his heirs and assigns, and that the County Commissioners were prohibited from granting a license to any other person, as indicating that it may have been intended to make the license to plaintiff exclusive, but say:

"But all the judges present, except one, held "that the grant was not intended to be exclus- "ive. In their opinion this view is sustained by "the consideration that, although the County "Court or County Commissioners were prohibit- "ed from granting another license at Dubuque, "yet this prohibition did not apply to the legis- "lature; and as it had the power to authorize "another ferry, the general authority to the "Council to license and establish ferries across "the Mississippi at the city enabled the corpora- "tion, in the exercise of its discretion, to grant a "license, as the legislature might have done."

The Court add that the restriction against the legislature granting another license does not apply in terms to it, and that it may be presumed that the increase in trade required additional ferries, and of this the granting power was the judge.

The case of the Proprietors of the Charles

River Bridge v. Proprietors of the Warren Bridge, 11 Peters U. S. 420, is a leading one on the subject of the construction of grants of franchises, and maintains the doctrine of strict construction where it is attempted to deprive the legislature of its sovereign power.

Most of the cases which we have examined relate to the question of exclusive franchises, but this question is analogous to that of the right of exacting minimum tolls; for, in both cases, the courts base their decision upon the ground that the legislature cannot be deprived of its power of future legislation by any implication which is not necessarily made from the previous grant.

In Stein v. Bienville W. Co., 141 U. S. 67, it was held that where a city (by contract confirmed by the legislature) had granted an *exclusive* right to supply the city with water from a certain creek, it was competent for the legislature to grant a franchise to another corporation to supply the same city with water from *another source*.

In Omaha &c. Co. v. Cable &c. Co., 30 Fed. 324, it was held that an *exclusive* franchise for a *horse railway* did not prevent the subsequent grant of a *cable railway franchise*.

And in Saginaw &c. Co. v. Saginaw, 28 Fed. 529, it was held that power in a charter to cause the streets to be lighted did not authorize an

exclusive grant of a franchise to furnish *gas* for 30 years, and that even *if such exclusive right could be conferred*, it would not prevent the municipality from subsequently granting a franchise to light the city with *electricity*.

That the right of regulation of water rates is vested in the State, has been determined by this court in cases involving the very constitutional provisions above referred to.

See Spring Valley W. W. v. Schottler 110 U. S. 347.

San Diego L. & S. Co. v. National City ~~U. S.~~

In the present case, appellees produce a contract which binds the municipality of Los Angeles not to lower water rates under its power of regulation reserved in the contract, and they ask, practically, that the legislature be restrained from exercising its prerogative of establishing such rates as may be reasonable (for the council is merely an instrumentality of the State in carrying into effect its policy concerning such matters).

We say that this cannot be done, and that the State cannot be thus prevented from acting for the public good where it has never deprived itself of the power.

Indeed, appellees adopt the same rule of construction in their interpretation of the language

of the covenant against a subsequent grant of the franchise of supplying the City with water.

The language, with reference to this, is: "And the said party of the first part hereby covenant and agree to make no other lease, sale, contract, grant or franchise, to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said City for domestic purposes during the continuance of this contract; always without prejudice to any rights already granted."

Here the language is that the city will grant no other water franchise, while, with regard to the clause concerning the reduction of water rates, the language is that the City will not make such reduction.

The admission of appellees' counsel, that no exclusive franchise was attempted to be granted is, we submit, an admission that the provision under consideration did not apply to the State.

II.

The City did not possess the power to bind the State not to reduce Water Rates.

Assuming, for the purposes of argument, that the contract, properly construed, does purport in fact to vest in the lessees the absolute right to receive minimum rates, we maintain that there was no authority for the municipality to enter into such a contract.

The conferring, on a private individual or corporation, of the right to exact minimum tolls is a franchise of the highest character; for it is manifest that the possession of such a privilege may prevent the State, in promoting the public welfare, from restraining the holders of monopolies (whether created by express provision of law or by circumstances which exclude competition) from oppressing the public which they serve.

Such franchises must emanate from the State, and the rule is thus laid down in 8 Am. and Eng. Ency. of Law, 585, (1st Ed.):

"Franchises are special privileges conferred "by government upon individuals, and which do "not belong to the citizens of the country gener- "ally, of common right. It is essential to the "character of a franchise that it should be a grant "from the sovereign authority, and in this coun- "try no franchise can be held which is not de- "rived from a law of the State."

Unless the power is granted to the City by the Legislature there was no authority to execute the contract in question, since municipal corporation do not possess any implied power of entering into such agreements, so far as they seek to create a franchise.

As laid down in Cooley's Constitutional Limitations (6th Ed.) pages 227-8, "the charter or the general law under which municipalities exercise their powers is their constitution in which

they must be able to show authority for the acts they assume to perform, and they have no inherent jurisdiction to make laws or adopt regulations of government, but are governments of enumerated powers, acting by a delegated authority, so that while the State Legislature may exercise such powers of government, coming within a proper designation of legislative power, as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred;" and at pages 231–3, it is said that the general disposition of the courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them, and that the reasonable presumption is that the State has granted in clear and unmistakable terms all it has designed to grant at all, and that if a party assumes to deal with such a public corporation on the supposition that it possesses powers which it does not have, or to contract in any other manner than is permitted by the charter, he will not be allowed, even though he may have complied with the undertaking on his part, to maintain a suit against the corporation based on its unauthorized action.

In Dillon on Municipal Corporations, it is said:

"It is a general and undisputed proposition of

"law that a municipal corporation possesses and "can exercise the following powers and no oth- "ers: first, those granted in *express words;* sec- "ond, those *necessarily or fairly implied* in or "*incident* to the powers expressly granted; third, "those *essential* to the declared objects and pur- "poses of the corporation, not *simply convenient*, "but indispensable."

1 Dillon Mun. Corp. Sec. 89 [O. S. 55] 4th Ed. p. 145.

"Any fair, reasonable doubt concerning the "existence of power is resolved by the courts "against the corporation, and the power is de- "nied."

Id Ib.

" * * The principle of strict construction "should not be pressed in any case to such an "unreasonable extent as to defeat the legislative "purpose fairly appearing upon the entire char- "ter or enactment. Perhaps the rule, as it is "briefly expressed in the text, but embodies the "result of the adjudications upon this point, "namely: if, upon the whole, there be fair, rea- "sonable substantial doubt whether the Legisla- "ture intended to confer the authority in ques- "tion, particularly if it relates to a matter extra- "municipal or unusual in its nature, and the "exercise of which will be attended with taxes, "tolls, assessments or burdens upon the inhabi- "tants, or oppress them, or abridge natural or "common rights, or divest them of their prop- "erty, the doubt should be resolved in favor of "the citizens and against the municipality."

Id. Note 2 to Sec. 91, page 149.

And the California cases are all to the same effect.

See Lowe v. City of Marysville, 5 Cal. 214;
City of Oakland v. Carpenter, 13 Cal. 540;
Douglas v. Mayor of Placerville, 18 Cal. 643;
Zottman v. San Francisco, 20 Cal. 96;
Wallace v. Mayor San Jose, 29 Cal. 186;
Herzo v. San Francisco, 33 Cal. 134;
Nicholson Pav. Co. v. Painter, 35 Cal. 699;
People ex rel. Green v. McClintock, 45 Cal. 11;
McCoy v. Briant, 53 Cal. 247;
Aid Soc. v. Reis, 71 Cal. 633;
Raisch v. San Francisco, 80 Cal. 6;
Ex Parte Roach, 104 Cal. 272;
Von Schmidt v. Widber, 105 Cal. 151;
South Pasadena v. Terminal Ry. Co., 109 Cal. 315;
Pork Packing Co. v. Broderick, 113 Cal. 628.

The City of Los Angeles was incorporated by special act of the Legislature, passed April 4th, 1850, [Statutes of 1850, p. 155], which simply declared that the former Pueblo of Los Angeles should be incorporated as a City under the general municipal corporations act, the number of the councilmen and the time of election of city officers being fixed, and it being declared that the City should succeed to all of the rights,

claims and powers of the former Pueblo in regard to property.

This municipal corporations act was passed March 11th, 1850 [Statutes of 1850, p. 87], and prescribed the powers of those cities which should be formed thereunder, as well of cities which should be incorporated by special act.

The only authority claimed by appellees to authorize the city to make the contract of 1868, is a provision contained in Section 11 of that act which is as follows:

"Section 11. The said City Council shall have power to make by laws and ordinances not repugnant to the Constitution and laws of the United States, or of this State; to prevent and remove nuisances; to provide for licensing, regulating, and restraining theatrical and other amusements within the city; to provide for licensing any or all business not prohibited by law; to fix the amount of license tax for the same; to regulate and establish markets; to establish a board of health; to cause the streets to be cleaned and repaired; to establish a fire department, and to make regulations to prevent and extinguish fires; to regulate the inclosure of any common field belonging to or within the limits of the city; *to provide for supplying the city with water*; to impose and appropriate fines, penalties, and forfeitures for breaches of their ordinances: provided, that no fine shall be imposed of more than five hundred dollars, and no offender be imprisoned for a longer term than ten days; to levy

and collect taxes; to lay out, extend, alter, or widen streets or alleys; to establish and regulate a police; to make appropriations for any object to city expenditures; to erect and maintain poor-houses and hospitals; to prevent the introduction and spreading of diseases; and to pass such other by-laws and ordinances for the regulation of the police of such city as they shall deem necessary; which by-laws and ordinances shall be published in the manner prescribed by the city council."

Sections 12 and 13 of the same are as follows:

"Section 12. The City Council shall have power to borrow money, and pledge the faith of the city therefor; provided that a majority of the legal voters in said town or city shall so decide by an election; the notice of said election to be given by the city council at least twenty days previous to said election; and, provided, that the aggregate amount of the debts of the city shall never exceed three times its annual estimated revenue."

"Section 13. The direct taxes imposed by the City Council in any one year shall not exceed two per centum of the valuation of property within the city."

At the time of the passage of the act of March 11th, 1850, there was no statute in force in regard to the formation of private corporations, and the first private corporation act which was passed was that of April 22, 1850, [Statutes of 1850, p. 347] which did not apply to water

companies; but by an act passed May 3rd, 1852, [Section 1] certain provisions of the act of April 22nd, 1850, were made applicable to "all associations already formed or hereafter to be formed for the purpose of supplying any cities or towns in this state, or the inhabitants thereof, with pure, fresh water," and Section 3 made the following provision:

"Sec. 3. This act shall not give to any company a right to supply any city with water, unless it shall be previously authorized by an ordinance, or unless it be done in conformity with a contract entered into between the City and the Company; any contracts hereafter so made shall be valid and binding in law, but shall not take from the City the right to regulate the rates for water, nor shall any exclusive right be granted by contract or otherwise for a term exceeding twenty years."

Subsequently, on April 22nd, 1858, [Statutes of 1858, p. 218] a special act for the incorporation of water companies was passed, by which two statutes, one of April 14th, 1853, and of April 30th, 1855, were extended to "all corporations already formed or hereafter to be formed, under said acts, for the purpose of supplying any city and county, or any cities and towns in this state, or the inhabitants thereof, with pure, fresh water."

This act of April 14th, 1853, [Statutes 1853, p. 87,] was for the formation of corporations for

manufacturing, mining, mechanical or chemical purposes, or for the purpose of engaging in any species of trade or commerce, foreign or domestic, and contained no provisions specially applicable to the supplying of water; and the act of April 30th, 1855, [Statutes of 1855, p. 205], simply amended Section 1 of the first act, by extending its provisions to corporations for wharfing and dockage purposes.

By Section 2, of the Water Companies act of April 22nd, 1858, above mentioned, provision was made for the acquirement of the necessary property with which to construct and carry on the works; and by Section 3, it was provided that all privileges, immunities and franchises which might thereafter be granted to individuals and corporations supplying San Francisco with water, should be granted to corporations formed under the act.

Sections 4 and 5, of the acts are as follows:

"Section 4. All corporations formed under the provisions of this act, or claiming any of the privileges of the same, shall furnish pure fresh water, to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor, and shall furnish water, to the extent of their means, to such city and county, or city or town, in case of fire, or other great necessity, free of charge. And the rates to be

charged for water, shall be determined by a board of Commissioners, to be selected as follows: Two by such city and county, or city or town authorities, and two by the Water Company; and in case that four cannot agree to the valuation then, in that case, the four shall choose a fifth person, and he shall become a member of said board. If the four commissioners cannot agree upon a fifth, then the sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be established. The Board of Supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water not inconsistent with this act and the laws and constitution of this state."

"Section 5. Any corporation created under the provisions of this act shall have the right, subject to the reasonable direction of the Board of Supervisors, or city or town authorities, as to the mode and manner of exercising such right, to use so much of the streets, ways and alleys in any town, city, or city and county, or any public road therein, as may be necessary for laying pipes for conducting water into any such town, city, or city and county, or through or into any part or parts thereof."

This is all the legislation in existence at the time of the execution of the contract which has any bearing upon the authority of the City to make the same, both with reference to the lease of the waterworks and the water and with re-

gard to the franchises purporting to be granted, excepting two special statutes, one passed April 11th, 1859, [Statutes of 1859, p. 199], authorizing the City to borrow $200,000 00, "for the purpose of municipal improvements, either of irrigation or for furnishing water for domestic purposes and lighting the city, and for any other purposes that may result to the benefit of the City and belong to the legitimate municipal powers of the corporation," and providing that the City should have the power to acquire property within three miles from its limits, for the purpose of making ditches, dams and reservoirs; and the other act passed Feb. 19th, 1862,[Statutes 1862, p. 10], giving the City power to borrow $25,000.00,"for the purpose of municipal improvements, either of irrigation or for furnishing water for domestic purposes."

Under these two last mentioned statutes, the City probably constructed the water works which are leased by the contract of 1868.

That the lessees did not believe that the City had authority to execute the contract, is pretty clearly shown by the fact that in 1870 they, or rather the Los Angeles City Water Company, to which the contract in the meantime had been assigned, obtained a special statute purporting to confirm the action of the city.

We submit that there is nothing in the language used in section 11 of the act of 1850

which gives countenance to the claim that the Legislature intended to vest in municipalities the right to enter into any and all contracts, at the pleasure of the municipal authorities, for the purpose of providing a water supply for the inhabitants.

The statute has never been so construed by the Supreme Court of this State, but all of the decisions, bearing upon the powers of cities with regard to such matters, proceed upon the assumption that the general provision, above referred to, does not enlarge the authority of municipal corporations so far as the entering into binding obligations is concerned.

The two special acts of 1859 and 1862, above referred to, show that it was not considered that the city had the right to borrow money for the purpose of constructing works with which "to provide for supplying the City with water."

In the case of People v. McClintock, 45 Cal. 11, a statute was passed giving the City of Sacramento power to advertise for plans, etc., and bids for machinery and connecting pipes, delivered and set up, for supplying the quantity of water required daily for the use of the City, and to submit the plans to a vote of the people, and to have the adopted plan carried out, and to issue certificates of indebtedness for the expenses; and it was held that there was no authority on

the part of the City to purchase a site upon which to construct the water works.

There are numerous cases in the State, some of which have been referred to, involving powers of cities to do some special act in performing the general powers already given, but the Supreme Court has always held that the carrying out of these general powers is to be effected by the means which the municipality possesses.

In others words, if a general power to provide a water supply is given, this does not include power to borrow money or to grant franchises therefor, but the authority to do these acts must be found elsewhere in the charter.

If a city is authorized to construct water works, it can do so with the money already in the treasury, or with such property as it already has, and the act to construct such works will be valid and not *ultra vires*.

Section 11, above referred to, gives the Council authority, by by-laws and ordinances, to provide for supplying the City with water, but no authority to grant franchises, or to enter into contracts containing obligations which the City has not the means to perform, is conferred.

The other provisions of the section would seem to refer to the exercise of the legislative powers of the City.

The word provide is used in the same section, where the Council is given power, by those by-

laws and ordinances, "to provide for licensing, regulating and restraining theatrical and other amusements within the City; and providing for licensing any or all business not prohibited by law."

Now, of course, the power to provide for licensing, etc., is one that is to be exercised by the City in its legislative capacity, and it will hardly be contended that it was competent for the Council to enter into a contract with private individuals or corporations by which the latter would be given this right of licensing.

Not only could this not be done as being an illegal delegation of legislative power, but because it was manifestly the intention that the Council should continuously provide for the licensing, regulation and restraint which it was authorized to provide for, and not to deprive itself of the power.

So with regard to the power of providing for supplying the City with water; the Council was to retain this power continuously.

As said in the case of Jackson &c. Co. v. Interstate &c. Co., 24 Fed. 306: "It (the power of controlling streets by the City) implies that the City today, tomorrow and so long as the grant remains, shall exercise its constant judgment as to the needs of the public in the streets, and not that it may today surrender to an individual or a corporation the right of determining

a score of years hence what the public may then need."

The City had commenced to exercise this power of providing for a water supply, by constructing its own works, and it attempted to effectually deprive itself of the power to carry on the work by entering into the contract in question.

At the time of the passage of the municipal corporations act of 1850, the City of Los Angeles, (or rather the Pueblo, for the City had not yet been incorporated), had the water with which to supply its inhabitants, and was actually engaged in bringing down water by means of water ditches, which had existed from the foundation of the Pueblo; but the means of constructing the works, excepting out of the current revenues, was not possessed by it until the two acts of 1859 and 1862 respectively, were passed, nor had it the power, by borrowing money, to acquire a plant.

By referring to Sections 12 and 13 of the act, it will be seen that the City was restricted from borrowing money without a vote of the electors, and the aggregate amount of the debts was limited to three times its annual estimated revenues; and the direct taxes could not exceed two per cent upon the assessed valuation of the property per annum.

And yet, with these restrictions, it is seriously claimed by appellees that it was competent for the City to enter into a contract which bound it to pay the value of all the improvements which should be made by the lessee during a long term of thirty years, which value has within the past year been fixed at $1,183,000.00 by arbitrators appointed under the contract, and the Company itself claims that it should have been at least two million dollars.

The contract binds the City to pay this value at the end of the lease, and, although the amount may not exceed the sum above mentioned, yet this circumstance is fortuitous, and the City might have been obligated, had a larger and more expensive water plant been constructed, to pay a vastly greater sum.

As said in Grand Rapids Electric etc., Co. v. Grand Rapids; 33 Fed. Rep. 659, it is simply a question of power, and if the right is conceded to make a grant for any definite period, then it follows that the time may be extended so as to be perpetual; and, on the other hand, if the power be conceded to obligate the City to pay $1,183,000, then the obligation could have been extended to an indefinitely large sum.

So with regard to the thirty years term, if it was competent for the City to confer on complainants' assignors the franchise of receiving minimum rates for thirty years, then the

time could have been extended to one hundred years or in perpetuity.

In State v. Cincinnati & Co., 18 Ohio St. 262, in construing a grant of a franchise to light the City for 25 years, it is said: "If, under the general power here given, a single City council might bind its successors not to make or permit any further use of the streets for a similar purpose for a period of 25 years, why not for 100 years, or in perpetuity? Was such the legislative intention? If so, we fail to discover it, either in the express terms of the statute, or as arising therefrom by clear and necessary implication."

There are numerous charter provisions, which have been constructed by the Court and the Courts of the several States, which gave much ampler powers with regard to the granting of franchises, and entering into contracts with regard thereto than Section 11 of the act of 1850, above referred to, but it has been uniformly held that the State could not be stripped of its general powers of supervision and regulation except by language which did not admit of a doubt.

The contract in question, may be considered as attempting to exercise three distinct powers, namely:

First. To contract with reference to the City's water works and water, which it held in trust.

Second: To confer a franchise to use the streets of the City and also to operate water-works therein, including the supplying of water to the inhabitants and the collection of rates therefor.

Third: In case it be construed to vest the absolute right to minimum rates, to exercise the strictly governmental power of declaring that it would not reduce the rates for water supplied to the inhabitants below a certain standard.

It is only with regard to the first kind of powers that the City can be considered in the light of a private corporation; for the weight of authority seems to hold that a municipal corporation has no power to confer an irrepealable franchise without express license from the legislature.

With regard to the last power, namely, the governmental one of fixing water rates for the inhabitants, as contra-distinguished from compensation for water supplied for strictly municipal uses, there can be no manner of doubt that it is only the State, in its sovereign capacity, which can confer on a private individual or corporation the right to be exempt from legislative control.

The question concerning the power of municipalities to grant franchises was discussed at great length in the case of National F. & P. W. v. Oconto W. Co., 52 Fed. Rep. 29.

There a city was vested "with the general powers possessed by municipal corporations at common law," and with authority to enact ordinances under the "general welfare" clause.

The general laws provided that cities could borrow money and issue bonds for the purchase or erection of waterworks; and could also permit the laying of pipes in the streets of the city and their maintenance and use for the purpose of conveying water, and also to own and operate waterworks, and to legislate on all matters, with reference to their construction, operation, management and protection.

Defendant was organized under an act authorizing the formation of water companies to construct and operate water works in any city, and to make any contract with such city to supply it with water for fire and other purposes upon such terms and conditions as might be agreed upon, and might by consent of the city authorities use any street, etc., for laying pipes therein, and any such city might by contract acquire the right to use the water supplied by such corporations upon such terms and conditions as should be agreed upon by such corporations and the city.

It was held that this did not give the City power to enter into a contract with a water company authorizing it to construct and operate water works therein for 30 years, and to lay

pipes in the streets, etc., to supply the City and its inhabitants with water, and to agree to pay the Company a specified annual rental for the 30 years.

The Court say that, at common law, the city would not have had the power, and although it might have contracted for a supply of water, it could not, without express legislative authority, construct or operate water works, nor grant an exclusive right to use the streets, which would be the essential result to allow a distributing plant in the streets.

"The right to use the public highways for gas "pipes or water mains rests in legislative "authority directly granted or delegated to mu- "nicipalities. So, likewise, the right to operate "waterworks is of legislative origin, and can "only be conferred by a municipal corporation "when expressly authorized by the supreme leg- "islative power of the State."

The Court then says that the City attempted to give to the Company power to construct and operate waterworks, "in addition to the right to "use the streets and public grounds of the City "for its water mains and pipes, and undertook "to regulate contracts and dealings between the "water company and the inhabitants of the City, * * * . *Whence came that power? I find no "legislative warrant for it.* The charter of the "City does not confer it. * * * The city is "therefore only authorized to permit the laying "of pipes in the streets, and their maintenance

"and use. This is not a grant of power to be-
"stow a franchise, but permission to suffer an
"easement. The law of its incorporation con-
"fers upon the Oconto Water Company the fran-
"chise, (1) to own and operate the water works,
"and (2) to use the streets of the city.
"The former power is without conditions; the
"latter is subject to the assent of the municipal-
"ity. The practical efficacy of the franchise
"may depend upon the discretionary act of the
"City. The franchise is not, however, derived
"from that discretion, but from the will of the
"Legislature. The law authorizes the City to
"assent to the exercise of a power granted by the
"statute. The grant of power to the Water Com-
"pany, as to the use of the streets, becomes ope-
"rative only upon the happening of that contin-
"gency of municipal assent. That is not a grant
"of power to a City to confer a franchise. * *
"It is, I think, clear that the power possessed by
"the City of Oconto was only to yield its assent
"to a legislative grant of the use of its streets,
"and to contract for a supply of water. The
"franchises of the Water Company were con-
"ferred by the Legislature of the State, and not
"by the ordinances of the City."

So in the case at bar; the lessees in the contract of 1868 possessed no franchise, unless they had it under the act of 1852, and, if that statute applied to them, they were subjected to the condition contained in section 3, which prohibited the City from parting with the right of regulating water rates. Indeed, the act of 1852

was equivalent to a legislative declaration that the right of granting a water franchise did not belong to cities under the municipal corporations act of 1850, for why give them the right of entering into contracts if the power already existed, and the rule of "inclusio unius," etc. is also applicable?

The doctrine enunciated in 52 Fed. 29, *supra*, is supported by the text of 8 Am. & Eng. Ency. of Law (1st. Ed.) p. 585, and authorities therein cited, to the effect that no municipal corporation has the power to confer a franchise unless authority to do so is expressly granted or necessarily inferred from the express grant.

See Dillon Mun. Corp. Sec. 724, 729;

New Orleans W. W. v. Rivers 115, U. S. 674;

Lehigh W. Co. v. Easton, 121 U. S. 388;

Stein v. Bienville W. Co. 141 U. S. 67;

Minturn v. La Rue 23 How. (U. S.) 435;

Jackson etc. Co. v. Interstate etc. Co. 24 Fed. 306;

South Pasadena v. Terminal R. W. Co. 109 Cal. 315.

So far from the City being given the power to deprive itself or the Legislature of the right of regulating water rates, we find two statutes in force at the date of the contract, the first of which (Act of 1852), expressly prohibited the City from parting with the power of fixing rates,

and the second of which (Act of 1858), provided a method by which water rates were to be fixed by Commissioners, two to be appointed by the Company, two by the City, and the fifth, in case of disagreement of the other four, to be selected by the sheriff.

Under the law in existence at the date of the contract, the City either had the power of regulating rates, or it did not possess that right.

If the power existed, the municipality could not part with it; and, on the other hand, if no such right of regulation existed, it certainly could not be conferred on private individuals.

The municipal corporations act of 1850 contains no express authority for cities to make any contract with reference to the regulation of water rates, and the other statutes of 1852 and 1858, with regard to water companies, already mentioned, state expressly that, so far as those companies were concerned, cities had no power to vest in them the right of collecting arbitrary or fixed rates.

There are several cases which deny to municipal corporations the right to vest such a power in private corporations, though possessing much larger charter powers with regard to the subject than are given by Section 11 of the Act of 1850; in fact, such charter provisions contain powers which might very well be construed as vesting the right of agreeing upon fixed rates

but for the rule of strict construction which applies in such cases.

In the case of Griffin v. Goldsboro Water Co., 122 N. C. 206 [30 S. E. Rep. p. 319], the precise question was determined, the case at bar, however, being a much stronger one in favor of our contention, as the North Carolina case was governed by a charter which gave the City authority to grant the franchise for waterworks.

In that case, the grant of the franchise stipulated that certain fixed rates should be charged to consumers, but the court held that this provision was not binding on the rate payers, though it did bind the Company.

It is there said: "While the defendant cannot charge more than the rates stipulated in the ordinance granting it the franchise, because granted upon that condition, *those rates are not binding upon the consumers*, who have a right to the protection of the courts against increased charges. Since the Constitution of 1868, [Article 8, Sec. 1], if the rates had been prescribed in a charter granted by the legislature they would be subject to revocation, and indeed independently of that constitutional provision. [Citing Stone v. Trust Co., 116 U. S. 307, and other cases]. *Still less can these rates bind consumers, if unreasonable or discriminating, since the town had authority to grant the franchise, but*

not to stipulate to rates binding upon the citizens, if the legislature does not confer that power. The rates are binding upon the company as maximum rates simply because, acting for itself, it has the power to accept the franchise upon those conditions."

In City of Danville v. Danville Water Co. 178 Ill. 299 [53 N. E. 118], it was held that a city was not authorized to agree upon fixed fire hydrant rates for 30 years under a statute authorizing it to "contract . . . for a supply of water for public use for a period not exceeding 30 years," nor under another statute which gave it power "to authorize any person or private corporation to construct and maintain the same (water works), *at such rates as may be fixed by ordinance* and for a period not exceeding 30 years."

It is said, with regard to the first statute, that the language did not necessarily imply the power to make *a fixed rate*, and that the business of supplying water to a city is public in its nature and impressed with a public interest, subject to be controlled by legislative action to the extent of being compelled to furnish the supply on equal terms and at reasonable rates; and that therefore the legislature could establish such rates or allow the city to do so.

With regard to the second statute, it was said that the meaning of the provision, allowing the

City by ordinance to establish rates, was that it should be done *from time to time and not at the beginning for all the time of the contract*, and that the clause, "for a period not exceeding 30 years," did not qualify the words "at such rates as may be fixed by ordinance." It is also said: "What might be proper for a city this year, might not be proper the next year. It is impossible to determine with absolute and even tolerable certainty what changes a few years might work in the character and reasonableness of rates to be charged for a water supply. No contract is reasonable by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting, in a proper way, emergencies or occasions that may arise."

In the case of City of Carlyle vs Carlyle Water, L. & P. Co. 52 Ill. App. 577, (decided in 1893), the first statute was similarly construed, it being held that plaintiff was bound by a 30 years contract to pay reasonable rates, and as the rates fixed by the original ordinance were not shown to be unreasonable, the city was obligated to pay them. "To hold that the price could be fixed by the ordinance for water supplied for public and private use for a period of 30 years, might impose a great burden, and result in the unjust exactions of large sums of money. It is no answer to say that inhabitants are not required

to take a supply of water from the company; as well say persons are not required to patronize railroads, hackmen, ferries, etc. Neither is it any answer to say that the company would not provide such supply unless the price was fixed for the whole period; for its business being impressed with a public interest, it could be compelled to provide such supply, on equal terms and at reasonable rates. Year by year conditions and prices with respect to almost everything relating to human wants are changing, and re-adjustments are permitted to meet them."

In Brenham v. Brenham Water Co., 67 Tex. 542 [4 S. W. Rep. 143], where the charter of a city provided that it "shall be capable of contracting and being contracted with," and gave it power "to provide the City with water for the convenience of its inhabitants and the extinguishment of fires"—and the law under which defendant was organized provided that it should have full power to furnish water to the City for public or private buildings or for other purposes and to lay pipes through the streets with the consent of the city—and a general law authorized any city in which a water company was organized, to contract with it for supplying the city with water—it was *held* that while the city could make some contract for supplying itself with water, yet it was not given any express power to make a contract granting the water

company the exclusive right to supply the city and its inhabitants with water for 25 years at a fixed rate per annum; and also that such exclusive right was void as being a monopoly.

There the City's charter also gave it power "to make, regulate and establish wells, pumps and cisterns, hydrants and reservoirs" for the extinguishment of fires and the convenience of the inhabitants."

The Court say: "No express power is conferred upon the City, through either or both of the charters, to make a contract through which the water company would become entitled to the use of the streets, and to have the exclusive right to furnish the city and its inhabitants with water at a fixed rate for 25 years; and we do not see that power to make such a contract was necessary or essential to the proper exercise of the power expressly given. * * * Whether and how a municipal corporation will exercise a discretionary power conferred upon it must necessarily depend upon the determination of that question by it, in the exercise of whatever legislative power has been conferred upon it. To secure the power to carry out such legislative determination, the making of one or many contracts may become necessary. * * * The City having been given such power as we have stated, it must be understood that it was intended, not only that it might use it,

but that it should use it, if deemed necessary for the public welfare, so long as the power is possessed by it, *i. e.* until taken away by the Legislature. Will not the contract under consideration, if valid, have the effect, not only to embarrass the city government in the exercise of the power conferred upon it, but to withdraw from it the right to provide, in any other authorized way, water for public purposes and the use of its inhabitants, which was the sole purpose for which the power to erect, maintain and regulate waterworks was given to it? It seems so to us * * * the power given to a municipal corporation to contract in relation to a given subject matter does not carry the implication that it may contract, even with reference to that, so as to render it unable in the future so to contract, as to any municipal matter, in which it is given power to legislate, as may be deemed best."

The case of Flynn v. Little Falls etc. Co. 77 N. W. Rep. 38, is to the same effect.

In Des Moines v. Des Moines W. W. C., 95 Iowa, 348 [64 N. W. Rep. 269], which involved a contract made in 1871 between the City, plaintiff, and Company defendant, by which the latter was granted the exclusive franchise for 40 years to supply water to the city and inhabitants, the rates to be fixed by the arbitrators if the parties could not agree, provided that they should not

be less than the average rates fixed in other cities in the State, it was said that no unalterable standard of rates was provided for, and that "if such a contract had been made, it might "admit of very serious doubt whether it could be "sustained. By the census of 1870 the population "of the city of Des Moines was about 12,000, in "1880 it was 22,000, in 1890 it was 50,000, and "it is now a city of about 60,000 inhabitants. A "contract binding the city to the initial rate for "40 years from 1871, and up to the year 1911, "might,and probably would, be held to be so un-"conscionable and unreasonable that it could not "be enforced."

And it was also held that the agreement to submit the rate to arbitration was void because not providing for the determination of reasonable rates, as the arbitrators were to ascertain the average rates in other cities, and not what were reasonable ones.

"It is apparent that while such a stipulation "is not absolutely impossible to be performed, "yet, as between the city and its inhabitants "and the water company; it is so indefinite, im-"practicable and unreasonable, in the method "prescribed for ascertaining the rates, that it "ought not to be sustained."

In Creston W. W. Co. v. Creston, 101 Iowa 687, [70 N. W. Rep. 739] a contract (ordinance) was made by a city with a water company, under power of charter to contract with an individual or company operating water works to supply

said city with water for fire purposes, and for such other purposes as might be necessary for the health and safety thereof, and to pay therefor such sum or sums as might be agreed upon between said contracting parties. The contract provided that the company should construct and operate water works for 25 years, and charge to consumers during such term the rates fixed in the contract, or other rates that might be established by the grantee, and approved by the Council of the City.

A general law [Ch. 16] conferred upon the cities the power to regulate water rates, and to regulate and fix the charges for meters, but that the act "shall not be construed to authorize the passage of an ordinance or resolution, on the making of any contract, whereby the above powers are abridged."

Held that, until the Council established other rates, those fixed in the contract were binding.

Per Cur: "It is not alleged or shown that the rates are unreasonable, and they are, therefore, binding until other reasonable rates are fixed. That the City Council may at any time, when those rates are found to be unreasonable, fix rates that are reasonable, we think, cannot, in view of said Chapter 16, well be doubted."

Now, the power on the part of a City to contract for a supply of water for municipal purposes, such as extinguishing fires, sprinkling

streets, flushing sewers, etc., is entirely different from the power to make a contract which declares that the inhabitants shall pay certain rates for water furnished them.

The power to declare what rates shall be paid by the inhabitants for domestic water is a governmental one, and, if possessed by a municipal corporation, it is held in trust to be exercised for the benefit of its citizens and cannot be delegated or parted with; and whether such power has been given to the municipality or not, the State still retains a like and paramount authority until given up by express grant.

Authority for a municipal corporation to make contracts does not empower it to make contracts of all descriptions, but only necessary ones.

Dillon Mun. Corp. Sec. 443 [O. S. 371].

In making a contract for a supply of water, it was not necessary that the City should contract with reference to the rates which should be charged its inhabitants.

The reasons which would induce the making of a long contract, so as to guarantee to the promoters of the work a sufficient time in which to remunerate themselves for their disbursments, would not extend to the case of fixing upon an arbitrary schedule of charges.

The argument in the former case has been made that no one will invest his money in an enterprise where his right of carrying on the

business may be terminated before he has realized on his investment, whereas, with regard to the latter case, the question of the amount of water rates is one that depends upon numerous conditions which are constantly changing, and rates, which would be reasonable and proper at the time of the granting of the franchise, might, and probably would become excessive and unreasonable after the City had grown in population and extent.

Where the water supply is sufficient, it costs no more to supply a thickly populated district than where the territory is sparsely settled.

The case at bar is an illustration of this fact; and the rates which existed in the primitive condition of the City, in 1870 (two years after the contract), are unreasonable at the present time; and, as it is, the reduced ones produce an enormous interest on the investment.

In Brenham v. Brenham Water Company, 67 Tex. 542 [4 S. W. Rep. 143], the Court say that the power to agree upon fixed rates for 25 years was not necessary to the proper exercise of the power *to provide the City with water;* and as it was not expressly given, the power was denied to the City.

In State ex. rel. etc. v. Cincinnati G. L. & C. Co., 18 Ohio St. 262, holding that a City, under power in its charter to cause the City to be lighted with gas, could not contract with a pri-

vate individual, giving him the exclusive privilege of using the streets, etc., for conveying gas to the City and its citizens for 25 years, and thereafter until the City should purchase the works at a fair price, it being provided that gas should be furnished for public lamps at two-thirds of the lowest average price at which gas should be furnished to private individuals in five cities; and it was said:

"The authority to make the contract must "therefore be found, if at all, in the general "grant of power to cause the City to be lighted "with oil or gas. This power carries with it, "by implication, all such powers as are clearly "necessary for the power and convenient exer- "cise of the power expressly granted; hence we "see no reason to doubt that the City Council "might, by contract, provide for the lighting of "the City by gas; and as the use of the streets "and alleys, for the purpose of laying gas pipe "therein would be almost, if not wholly indis- "pensable to such an undertaking, it would "clearly be competent for the City Council to "grant to the contracting party the right to such "use. But no such necessity is perceived for "making the use exclusive. The same streets "might consistently be used by two or more "persons or Companies, for the purpose of lay- "ing down their gas pipes."

The case of Davenport v. Kleinschmidt, 6 Mont. 502 [13 Pac. Rep. 249], also held that a con-

tract for a specific term to supply gas at a minimum rate was void.

And in Leadville W. Co. v. Leadville, 22 Col. 297 [45 Pac. Rep. 362] it was declared that the Courts would enforce a contract providing a method of fixing water rates only where it was reasonable and not unconscionable.

The law under which the Leadville case was decided gave a City the right *to agree upon water rates* with the Company receiving a contract to supply water.

The same doctrine is held with regard to street railroad fares, and in Millhaus v. Sharp, 17 Barb. 435 [same case on appeal 27 N. Y. 611], it was decided that where the City of New York had the right to control the streets and to fix the rates of fare to be charged by public carriages (which were held to include street cars), it was not competent for the City to divest itself of the power by granting a perpetual right to use the streets for street railroads, or to surrender its power of regulating the fares by providing that a certain rate of fares should be charged without the right of the Council to change the same.

If the power to fix water rates was vested in the City, such power could not be delegated or bartered away.

With regard to the proposition that the City could strip itself or the State of the future right

to regulate water rates, if such was given by the Act of May 3, 1852, the unbroken line of authorities is to the effect that this could not be done.

"Equally incumbent upon the State Legisla-"ture and these municipal bodies is the restric-"tion that they shall adopt no irrepealable "legislation. No legislative body can so part "with its powers by any proceeding as not to be "able to continue the exercise of them. It can "and should exercise them again and again, as "often as the public interests require. Such a "body has no power, even by contract, to con-"trol and embarrass its legislative powers and "duties."

Cooley's Constitutional Lim., p. 250.

"The principle is a plain one, that the public "powers or trusts devolved by law or charter "upon the council or governing body, to be "exercised by it upon and in such manner as "it shall judge best, cannot be delegated to "others."

1 Dillon Mun. Corp. Sec. 96, (O. S. 60).

"Powers are conferred upon municipal cor-"porations for public purposes; and as their "legislative powers cannot, as we have just seen, "be delegated so they cannot, without legislative "authority, express or implied, be bargained or "bartered away. Such corporations may make "authorized contracts, but they have no power, "as a party, to make contracts or pass by-laws "which shall cede away, control or embarrass "their legislative or governmental powers, or

"which shall disable them from performing "their public duties."

1 Dillon Mun. Corp., Sec. 97 (O. S. 61).

In Jackson etc. Co. v. Interstate etc. Co., 24 Fed. 306, it was held that a City, under a power in its charter of general supervision and control of the streets, did not authorize the municipality to grant an exclusive right to construct and maintain a street railroad for 21 years.

It is said [p. 307–8]: "The Legislature has, "as the general representative of the public, the "power, subject to specific constitutional limi- "tations, to grant special privileges; it may, "with similar limitations, grant the like power "to municipal corporations as to all matters of a "purely municipal nature; but, as the posses- "sion by one individual of a privilege not open "to acquisition by others apparently conflicts "with that equality of rights which is the under- "lying principle of social organization and popu- "lar government, he who claims such exclusive "privilege must show clear warrant of title, if "not also of probable corresponding benefit to "the public. Hence the familiar rule that char- "ters, grants of franchises, privileges, etc., are to "be construed in favor of the government. "Doubts as to what is granted are resolved in "favor of the grantor, or, as often epigrammati- "cally said, a doubt destroys a grant."

Again, at page 308, it is said that "power to "permit one citizen to use the streets in a given "way is a very different thing from power to give "such citizen the right to keep every other citi-

"zen from a like use of the streets. The one "is a mere street regulation—a license; the "other rises into the dignity of a contract—a "franchise. The one may rest upon the ordi- "nary powers of street management and control, "the other requires the support of a special "grant."

It is also said at page 308, that by giving such exclusive right to occupy the street, the City practically transfers control of the streets to the grantee.

In Long v. Duluth, 49 Minn. 280 [50 N. W. Rep. 913], it was held that power in a charter to provide a system of water works, grant the right to a private corporation to establish such system and supply the municipality with water and to contract therefor, does not confer on the municipality the power to grant an exclusive franchise for 30 years, so as to disable the municipality from itself establishing water works.

It is said: "If there is any ambiguity or "reasonable doubt, arising from the terms used "by the legislature or granting body, as to "whether an exclusive franchise has been con- "ferred, or authorized to be conferred, the doubt "is to be resolved against the corporation or in- "dividual claiming such grant Public policy "does not permit an unnecessary inference of "authority to make a contract inconsistent with "the continuance of the sovereign power and "duty to make such laws as the public welfare "may require. * * * Such power was cer-

"tainly not expressly conferred. Nor was it "necessarily involved in the authority given to "contract for a water supply, and to confer the "right upon one or more private corporations to "establish water works and a supply system. "Such general language falls short of express- "ing an intention to confer the power to grant an "exclusive franchise which shall, in effect, bind "and restrict, not only the village, but the State, "in the exercise of its governmental functions for "30, 60 or 100 years, or forever. It may be said "that the power to contract would be useless, "unless the privilege conferred may be made ex- "clusive; for otherwise private corporations or "persons would not engage in an undertaking "involving the necessity for large expenditures "of capital in works which might be rendered un- "profitable, if not valueless, by the subsequent "action of the municipal or State government. "The argument is not without force. The cases "cited above, and others, show that it has often "been advanced in support of claims of exclusive "privileges, but it has rarely, if ever, prevailed. "It suggests considerations of policy which may "influence the legislature to grant, or to author- "ize the granting of, exclusive privileges; but "the principles in accordance with which legis- "lative grants of this kind are to be construed "seem to be so clearly established that, gener- "ally, not much weight can be given to such an "argument in determining the effect of particu- "lar legislative action."

In Brenham v. Brenham Water Co., 67 Tex. 542, [4 S. W. Rep. 143] *supra*, the Court in

holding the franchise void, admitted that under the power granted it was competent for the City to make some contract for supplying itself with water, but say that, as the power was not expressly given to make the contract in question, and as such power was not necessary to carry out the authority conferred, the charter could not be construed as permitting the municipality to part with its continuous right of determining the mode and manner which water should thereafter be furnished.

In Davenport v. Kleinschmidt, 6 Mont. 502, [13 Pac. 249] *supra*, the right to make a long contract was denied to a city which had authority to provide itself with gas; and in Richmond etc. Co. v. Middleton, 59 N. Y. 228, the same construction was put upon a similar charter.

The legislative powers of municipal corporations are conferred for the public good, and it is the policy of the law that the agents of the State should continue to exercise their delegated authority; and the same rule is, therefore, applied to contracts, which attempt to cede away these governmental powers confided to municipalities, as prevails with regard to legislative grants, concerning which latter the doctrine was thus laid down in Wright vs. Nagle 101 U. S. 791, holding that power to the inferior court of a county in Georgia to establish ferries and provide for all other matters relative to ferries, did

not give power to grant an exclusive right of ferry:

"Every statute which takes away from "a legislature its power, will always be construed "most strongly in favor of the State. * * The "question here is whether the legislature of "Georgia conferred on the inferior courts of its "several counties the power of contracting away "the right of the State to establish such ferries "and bridges in a particular locality as the ever "changing wants of the public should in the "progress of time require. It gave the courts "the right to establish ferries or bridges but not "to tie the hands of the public in respect to its "future necessities."

Even if the City had power to stipulate concerning rates which were to be charged by the lessees in the contract, such power did not extend to agreeing upon unreasonable rates.

Counsel for appellees practically concede this, when they admit [page 40 of Brief], that if the rates were exorbitant, a court of equity would refuse to enforce them.

We submit that all rates are exorbitant which are unreasonable, and, therefore, if the rates fixed by the ordinance which is attacked in the present suit are reasonable, it follows that those which are claimed to have been in force in 1868 are unreasonable, if higher.

Some of the cases which we have already cited, show that this principle is well settled.

It would indeed be a strange doctrine for a Court of equity to lend its assistance to a water monopoly in forcing the public to pay tolls in excess of what should be charged for the public service, and especially in the present case, where no act had been done by the municipality or any of the rate-payers to prevent the Company from exercising its rights.

Certainly, if there ever was a case where the party should be left to enforce his legal rights in a Court of law, and refused assistance in chancery, the present is such a one.

It is not attemped to allege in the bill that the rates, which have been fixed by the ordinance in question, are in any wise unreasonable.

The evidence establishes the contrary, and shows that the Company is in receipt of a princely income, far beyond the usual returns on large investments.

As already stated, according to the stipulation of facts, the Water Company has received from the date of the contract up to October 31, 1896, the enormous aggregate amount of $4,228,898.00, and would have received, by the sale of the contract, the further sum of $750,000, making in all some $5,000,000.00.

The itemized expenses are not set forth, but it is stated that during that last year a dividend of $68,200.00 was declared, and that the general construction account amounted to $173,298.00,

the expense account to $92,358.00 and the maintenance account to $75,844.00, an additional amount of $35,457 being inserted for interest. [Record fol. 257]

As before shown, it was stipulated that the Crystal Springs Land and Water Company was incorporated in December, 1886, by the same stockholders who composed the other Company, and that all of the property of the original Company, which was located outside of the City, was transferred without consideration to the new corporation, which immediately turned around and gave back a lease to the old Company of the same property at a rental of forty per cent of the gross water rates.

This forty per cent, then, is doubtless included in the expense account, and would make an additional dividend of $168,800.00, which was divided among the stockholders.

What the other expenses are made up of cannot be known, as the Company has avoided giving the itemized statement which was required by the statute; but at any rate, the facts show that it is impossible that less than reasonable rates are allowed by the ordinance, and, indeed, it is not attempted to attack it on the ground that the rates are unreasonable; nor does it appear that the Company's income was at all reduced by the alleged lesser rates provided for in the ordinance of 1897.

No assessments have been levied by the new Company, all of its expenses and the price of its property having been paid out of the water rates [Record fol. 224], and it does not appear that the old Company ever raised from its stockholders, for the purchase of property or payment of expenses, any money with the exception of $79,500.00, which was paid prior to October, 1883 [Record fol. 243].

The contract expressly provides that, at the termination of the lease, the City shall pay to the lessees, or their successors in interest, the value of all the improvements; so that, in addition to receiving the dividends which will have been paid to the stockholders during the term of the lease, they will (unless they incur a forfeiture by breach of the contract), also receive back a large amount of the expenses which have been paid by the company out of water rates, the appraised value of those improvements being, as already remarked, $1,183,000.00

It is a well settled doctrine that where tolls are allowed to be collected for services rendered to the general public, the charges must be reasonable, and in all cases there is an implied condition that this shall be so.

The doctrine is thus laid down in Hale's "De Partibus Maris," cited in Cooley's Constitutional Limitations [5th Ed.] p. 738:

"If the King or subject have a public wharf

"unto which all persons that come to that port "must come and unlade or lade their goods as "for the purpose, because they are the wharves "only licensed by the Queen, or because there is "no other wharf in that port, as it may fall out "where a port is newly erected; in that case "there cannot be taken arbitrary or excessive "duties for cranage, wharfage, pesage, &c., "neither can they be enhanced to an immoderate "rate; but the duties must be reasonable and "moderate, *though settled by the King's license or "charter.*"

In Stone v. Trust Co., 116 U. S. 307, it was held that the provision in a railroad charter allowing the Company "from time to time, to fix, regulate and receive tolls and charges by them to be received for transportation of persons and property," was subject to the limitations of the common law rule that these charges should be reasonable, and that the State could declare what was reasonable. The Court say: "This power of regulation [of charges] is a power of government, continuing in its nature; and if it can be bargained away at all, it can only be by words of positive grant or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power."

In Leadville W. Co. v. Leadville, 22 Col. 297 [45 Pac. Rep. 362], it is said that if the parties (City and Company) prescribe a mode of fixing

water rates, and this method is *reasonable and not unconscionable*, the Courts will enforce it.

In Des Moines v. Des Moines W. W. Co., 95 Iowa 348 [64 N. W. Rep. 269], already quoted from at length, the reasons for denying a right on the part of municipal corporations to establish an arbitrary standard of water rates are set forth; and the argument therein used applies with still greater force to the City of Los Angeles, which had a population of only 5,000 at the date of the contract, but has now over 100,000 inhabitants.

In the case of Santa Ana Water Co. v. San Buenaventura, 56 Fed. Rep. 339, cited and relied on by complainants, the circuit judge, in sustaining the validity of the contract involved in that case (which gave to the grantees "the *unrestrained* right to establish such rates for the supply of water to private persons as they may deem expedient, provided such rates be general"), held that there was an implied condition that the rates to be charged should be reasonable; and he only overruled the demurrer to the bill on the ground that it was expressly charged that the rates were unreasonable and did not afford a reasonable interest on the investment.

It is assumed for the purpose of this argument that the contract was a valid one and bound the City and the Legislature equally; but upon the question as to whether or not the

City originally had power to make the contract, the argument against the right to agree upon arbitrary rates, without regard to their reasonableness, applies with still greater force.

"Municipal by-laws must also be reasonable. "Whenever they appear not to be so, the court "must, as a matter of law, declare them void."

Cooley's Constitutional Limitations, p. 240–1.

It certainly cannot be contended that an ordinance is reasonable which establishes unreasonable water rates; nor can it be doubted but that water rates which are fixed for a population of 5,000 inhabitants, and, based upon certain expenses for the cost of the plant and its maintenance, would not be proper charges thirty years afterwards when the population was twenty times as great and where all of the conditions in regard to expenses had changed.

The presumption is that rates established by the Council are reasonable.

Des Moines v. Des Moines W. W. Co., 95 Iowa, 348 [54 N. W. Rep., 269] *supra.*

If the provision with regard to water rates, contained in the contract in question, is in violation of a statute, it is void under the authorities cited, if it were required to find authorities for such a proposition.

The act of May 3rd, 1852, already referred to, would seem to have assumed that associations

for supplying cities with water had been attempted to be formed under the provisions of the general corporations act of April 22nd, 1850, although that act did not expressly authorize the formation of such corporations, and it is accordingly provided that the provisions of certain chapters of the act of 1850 should apply "to all associations already formed or hereafter to be formed under said act" for those purposes.

The act of 1850 does not purport to give any corporation the right of using the streets of cities or to collect rates for water supplied to the inhabitants; and the act of 1852, expressly declares that it "shall not give to any Company a right to supply any City with water unless it shall be previously authorized by an ordinance, or unless it be done in conformity with a contract entered into between the City, and the Company; any contracts hereafter so made shall be valid, and binding in law, but shall not take from the City the right to regulate the rates for water, nor shall any exclusive right be granted by contract or otherwise, for a term exceeding 20 years."

According to the stipulation of facts, it appears that the leesees procured the contract of 1868, for the benefit of themselves and certain associates, with the intention of forming a water corporation under the act of 1858, which was ac-

cordingly done in the month following the execution of the contract, and all of the works were constructed by that Company. [Record fols. 225–6].

Even if the City was authorized to enter into a contract for a water supply with private individuals, yet, we submit that, if it was intended, at the time of procuring the contract, that it should be transferred to a corporation and that that corporation should carry out the contract, it came within the spirit of the act of 1852.

In San Francisco v. Spring Valley W. W. 48 Cal. 493, the validity of a water franchise, granted by the State to individuals upon the condition that the act should not be effective until the grantees had formed a corporation for the purpose of carrying out the franchise, was involved, and the supreme court of California held that this was in effect a grant to the corporation thereafter formed, and was within the inhibition of the Constitution which prohibited the formation of private corporations by special act.

In San Luis Water Co. v. Estrada, 117 Cal. 168, which involved the granting by the State to a private individual of a water works franchise, which was subsequently transferred to a corporation, it was conceded that, if the contract had been obtained with the intention of forming the corporation, it would have come

within the principle established in 48 Cal. 493, *supra*.

Any other construction would have rendered the Statute practically inoperative, for contracts would have been taken in every case in the name of private individuals and subsequently transferred to a corporation, for the distinct purpose of avoiding the provisions with regard to the term and exclusiveness of the franchise, as well as with reference to the power of the municipality over rates.

But even if the contract was not within the express provisions of the act of 1852, it was certainly contrary to the policy of the State as manifested in its legislation on the subject concerning the supply of water to cities.

The rule is well settled that a municipal corporation cannot pass any ordinance or enter into any contract which is in conflict either with the express letter of the statutes of the State or with the policy of those statutes.

Section 319 [O. S. 253] Dillon Mun. Corp.

In the same work, it is declared that all acts of municipal corporations, done under their implied powers, must be reasonable, and not only not in conflict with express laws, but not inconsistent with the policy of the State; and it is stated in Section 329 [O. S. 263], that the incidental powers of municipalities must be so exercised as not to

infringe or be repugnant to the policy of the State as declared in its general legislation, and instances are cited in that section and the note thereto which show that municipal corporations can do no act which it can be presumed the legislature would not have authorized them to do, judging from the policy of the State as manifested in its general laws.

Here were two statutes in existence, one declaring that, in entering into contracts with associations for supplying water to cities, the municipality should not deprive itself of the right of regulating charges, and the other providing a method by which charges, to be made by Water Companies, should be regulated by a commission, in the selection of which the City would have an equal voice; and can it be doubted that it was not the intention of the Legislature to vest in such cities the right of binding themselves and their inhabitants to fixed rates and for all time, where the water was supplied by private individuals?

If the rates fixed by the contract of 1868 could have been established for the term of 30 years, irrespective of their reasonableness, then they might have been fixed at double or treble the amount, and the inhabitants of the City would have been bound to submit to this most grievous burden, for the Com-

pany had a practical monopoly, and claimed one, as will be shown further on.

As stated in several of the cases already cited, the mere fact of a company having obtained entrance into a city and laid pipes and being engaged in supplying water, would constitute a monopoly in effect.

The needs for the commodity are constant and pressing, and consumers are bound to resort to the supply at hand.

To construct a plant for supplying a city of any considerable size, a large expenditure of capital is required, and practical experience shows that combinations, in opposition to an already established system, are rare and difficult of formation.

The old company already has the field, and new ones do not generally feel like taking the risk of entering into competition.

Moreover, under the provision which prohibits the City from granting another water franchise, contained in the contract in question, the Los Angeles City Water Company effectually deterred any one from invading its field.

The power of the City to contract does not extend to such contracts as are against public policy.

Saginaw G. L. Co. v. Saginaw, 28 Fed. 559.

The provision in the contract in question, restraining the City from reducing rates, if it be

held to apply to the State, is inconsistent with the continuance of the sovereign power and duty of the Legislature to make such laws as the public welfare may require, and is contrary to public policy.

Long v. Duluth, 49 Minn. 280, [51 N. W. 913,] *supra.*

We add the following authorities to the point that a municipal corporation cannot, without express authority from the Legislature, grant the right to take tolls.

Dillon Mun. Corp., Sections 724–729;

Cooley Con. Lim. (5th Ed.) 736 (Star page 594);

Mullarky v. Cedar Falls, 19 Iowa 21;

Colton v. Hanchette, 13 Ill. 615;

Clark v. Des Moines, 19 Iowa 223.

With regard to the power of the City to make the lease of its waterworks and water, we contend that it did not exist.

As already explained, the City was vested with the ownership of the paramount right to use all of the waters of the river to the extent of its needs, including the irrigation of lands and the supply of water for domestic purposes. It held these waters as a public trust, for the benefit of the municipality and its inhabitants.

The waterworks (which counsel for appellees attempt to show were worthless and insignificant in amount, but which the lessees were only too

willing to receive from the City), were held on the same public trust.

Property, held in this manner by a municipal corporation, cannot be disposed of without express authority from the Legislature, and the usual provisions contained in charters, authorizing the sale and leasing of property, do not apply to such public property.

The right to the river waters had been held by the former Pueblo in trust for the public benefit, and the City, as its successor, continued in the ownership upon the same trust.

The waterworks were acquired for the purpose of discharging a function confided to the City by its charter, and the cost thereof was doubtless paid with the proceeds of the bonds which were authorized to be issued by the two special acts already referred to.

In Branham v. Mayor of San Jose, 24 Cal. 602, the power of the City of San Jose, as successor of the former Pueblo, to mortgage its Pueblo lands, was passed upon by the Supreme Court of California, and it was declared that no such power existed, as the lands were held on a trust which was inconsistent with the power of mortgaging.

In Redding v. White, 27 Cal. 285, it was held that a Pueblo in California could not make a 99 years' lease of its lands, with right of renewal.

In Lux v. Haggin 69 Cal. at page 329, which

case contains a full discussion of the rights of Pueblos to the waters of streams on which they were established, it was declared that the successors of Pueblos could not dispose of the waters held in trust by them for the benefit of their inhabitants.

In Huron Water Works Co. v. City of Huron, 7 S. D. 9 [62 N. W. 975], it was held that when a City constructed water works and paid therefor by the issue of bonds, and thereafter operated the same for several years for supplying water for fire purposes and for the use of its inhabitants, (the City being authorized to make all necessary contracts for the exercise of its powers, to purchase, hold, lease and convey real and personal property for the use of the City, and to exercise all the rights and privileges pertaining to a municipal corporation; and to organize and support fire engine companies, and to construct and furnish reservoirs, etc., for protection against fires, and to construct and maintain water works and make all needful regulations concerning the distribution and use of water therefrom), it had no power to sell such property, and that it could recover back the works without repayment of money paid by the purchaser into the treasury, it not being shown that the City appropriated the money, and the Court say:

"From the examination of the authorities we consider that there is no distinction between the

nature of water works property owned and held by the City, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, court houses, fire engines, and apparatus, and other property owned and held by the City for public use. All such property is held by the municipality as a trustee in trust for the use and benefit of the citizens of the municipality, and it cannot be sold or disposed of by the common Council of the City, except under the authority of the State legislature. Such property, as before stated is private property in the sense that the municipality cannot be deprived of it without compensation, no more than a private corporation can be deprived of its property by the law-making power. Such property is so owned and held by the municipality as the trustee of the citizens of the municipality for the use and benefit of such citizens. It has been acquired by the corporation at the expense of the tax payers of the City, for their use and benefit, and the law will not permit the corporation to divest itself of its trust, nor to deprive the citizens of their just rights as beneficiaries of the same."

The case of Mereweather v. Garret, 102 U. S. 472, is cited to the effect that property held for public use or governmental purposes, cannot be subjected to the payment of the debts of a municipal corporation, and the case of New Orleans

v. Morris, 105 U. S. 600, to the effect that water works of a city can not be sold for its debts.

In Lord v. Oconto, 47 Wis. 386, [2 N. W. 785], it was held that where a city, under authority to construct a pier and to fix and collect wharfage therefor, built the wharf and made a lease of it, such lease was void, as the power to regulate the tolls was vested only in the Mayor and Common Council and could not be delegated.

The same doctrine was held in Mullarky v. Cedar Falls, 19 Iowa 21, in regard to a deed of trust of a toll bridge belonging to the City.

In San Francisco v. Itsell, 80 Cal. 57, it was held that the City of San Francisco, which was the successor of the former Pueblo, could not dispose of lands held by it for public parks.

So where a City was empowered to erect and regulate public wharves, and fix the rates of wharfage thereat, it was held that it could not lease the wharf, farm out the revenues, and delegate to private individuals the power to fix the rates.

Matthews v. Alexandria, 68 Mo. 115.

In City of Corpus Christi v. Central Wharf and W. Co., 8 Tex. Civ. App. 194 [27 S. W. 803] the City, (plaintiff) was by its charter given the power of extending its streets to the channel of the bay, and to erect, maintain and own wharves at the end of the street as it deemed proper, and to fix the rate of wharfage

and collect the same, the State relinquishing to the City all of said rights; and it was further provided that the City could take, hold and purchase, lease, grant and convey such real and personal property or estate as the purposes of the corporation might require.

The defendant Company was, by its charter, authorized to rent or acquire, by purchase or otherwise, all water rights and property for wharves and warehouses.

The City leased to defendant, for 20 years, all of the wharf privileges owned by it, with certain limitations in the amount of rates of wharfage, and providing that no charge should be made for vessels lying along side of the wharves —the defendant being obliged to pay a rental of $4000 00 per annum.

Held that the lease was void as exceeding the powers of the City to dispose of property held in public trust, but that defendant, having enjoyed the property, could not repudiate the rent for the period of such enjoyment.

The Court quotes from Dillon Mun. Corp., Sec. 27, with regard to such property being public, and also Sec. 96, that public powers in trust could not be delegated, and say:

"The power to provide for the improvement "of the harbor of Corpus Christi and for the "erection and maintenance of public wharves, "and for the regulation of charges for their use,

"was essentially legislative, and belonged to "the Legislature of the State. By the act in "question it was relinquished to the local gov- "ernment of the City to be exercised in its "legislative discretion, for the best interests of "the people. Such powers as these, when con- "ferred upon municipal governments, cannot be "delegated, surrendered or bartered away."

With regard to the general powers of selling and leasing, it is said that this power "is an ordinary one granted to most corporations. Without express grant, it arises by implication, where the ownership of property is essential to the purposes for which it was created, and such a grant cannot be construed to authorize the surrender of governmental powers held for the public advantage."

See also Ogden v. Bear Lake etc. Co., 16 Utah 440 (52 Pac. 697).

The Supreme Court of California held the same doctrine with regard to the limitation which is put on the general words of a charter, limiting the power of a City to purchase property, as being a declaration of the corporate capacity and power of the body politic to be exercised in the mode and under the limitations subsequently provided in the charter.

Von Schmidt v. Widber, 105 Cal. 151.

The lease of the water works and the waters was the principal part of the contract, and it is

beyond doubt that neither of the parties would have entered into it but for the lease.

The title of the ordinance, authorizing the execution of the contract, shows that the purpose of the City was to provide for the care and improvement of its water works system, and as this main purpose could not be carried out by reason of its being illegal, the whole contract must fall.

Higgins v. San Diego, 118 Cal. 524.

This result will not affect the Company, as it has gone on for the whole of the 30 years' term and collected only the rates which were fixed by the Council.

III.

The Provision of the Contract of 1868, Restraining the City from Granting any other Franchise, if it Created an Exclusive Franchise, Invalidated the whole Contract.

This provision reads as follows:

"And the said party of the first part hereby covenant and agree to make no other lease, sale, contract, grant or franchise to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said city for domestic purposes during the continuance of this contract, always without prejudice to any rights already granted."

The City is here restrained from granting any other franchise, just as it is prohibited from reducing water rates below those in existence at the date of the contract; and we submit that if the latter provision had the effect of binding the State, then an exclusive franchise was also attempted to be conferred, for the same term of binding obligation is used in both cases.

The concession, therefore, by appellees that no exclusive franchise was attempted to be given, is a confession that it was not intended to restrain the Legislature from interfering with regard to the regulation of rates.

The contention of appellees' cousel is that the prohibition against the granting of any other franchise extended only to the waters of the river, but the language used admits of no such construction.

The contract contains no reference to the source of water supply, excepting that permission is given to the lessees to take not exceeding ten inches from the river, and the fact that they were prohibited from taking more without the consent of the City, shows that it was contemplated that a different source of supply might be selected

In fact, the Crystal Spring tract, which the bill alleges was purchased by the Los Angeles City Water Company and afterwards transferred to the Crystal Springs Land and Water Com-

pany, and upon which an alleged development of water was made, was looked upon at the time of the contract as a probable source of supply, as will be shown further on.

The language used is, however, free from ambiguity, and the City is prohibited from granting to any person, company or corporation, any franchise for the sale or delivery of water to the inhabitants of the City for domestic purposes.

If, then, the restraint applied to the State as well as to the City in its corporate capacity, the effect was to create a monopoly, and inasmuch as the City did not have the express or implied power, (as shown under the authorities already cited), to grant an exclusive franchise, the provision was void and invalidated the whole contract.

This principle was discussed in the case of Welleston v. Morgan, 59 Ohio 147, [52 N. E. 127], involving the making of a lighting contract for 99 years under power to enter into one for 10 years, and it was held that the contract was wholly void, the Court saying: "The purpose is to inhibit such contracts entirely, and the only certain way of insuring their non enforcement is to prevent their attempted execution. This may not be effectually accomplished unless they are held to be void."

The same principle was applied in the case of Brenham v. Brenham Water Co., 67 Tex. 542,

[4 S. W. 143], *supra*, which holds that the grant by a city of an exclusive franchise, without power in its charter to do so, renders the whole contract void.

That this would have the effect of invalidating a contract is practically conceded in Walla Walla v. Walla etc. Co., 172 U. S. 1.

See also Higgins v. San Diego, 118 Cal. 524;

Nicholasville W. Co. v. Nicholasville, 36 S. W. Rep. 549.

As stated in the Welleston City case, the reason for declaring that an illegal provision, which is against public policy, annuls the whole contract, is to deter cities from entering into such contracts.

Although the provision may be void, yet it is a weapon which can be used to frighten and harass others who may obtain a similar grant; though, it might well happen that any municipality, entering into such an illegal arrangement, might consider itself, in honor, bound to abstain from making any other grant, and thereby practically deprive itself of the power which remained in it to provide for the public welfare by permitting competition.

The case at bar is a good illustration of the evils which are likely to attend the insertion of such an illegal restraint.

The Los Angeles City Water Company main-

tained, from the first, that a franchise could not be granted to any other corporation or individual for the purpose of supplying water for domestic purposes to the inhabitants of the City of Los Angeles, and only permitted water plants to be constructed for the supplying of localities which were inaccessible to its system.

The case of Los Angeles City Water Company v. Stern and others, which was brought in the Superior Court of the County in which the City is situated, had the effect of doing just what we claim would be done under similar circumstances, and the defendants, who had obtained the grant of a water franchise from the City, after being harassed and delayed by the litigation which was precipitated on it by the Los Angeles City Water Company, finally succumbed, so as to leave the field to the Company.

In that case defendants contended that the franchise was not intended to apply to any waters except the Los Angeles river, but the learned Judge of the *nisi prius* Court held that the contention was not well founded, though the attempted grant of the exclusive franchise was decided to be void.

Inasmuch as the opinion in that case discussed many of the questions involved here, we append a copy thereof to our brief, and respectfully re-

for this Court to the same for a discussion of the different questions involved.

IV.

The Special Act of 1870, Purporting to Ratify the Contract of 1868, is Unconstitutional and Void.

It is claimed by appellees that, if the contract in question was invalid in its inception, it was confirmed and validated by a special act of the Legislature which was passed April 2nd, 1870, and a copy of which is is set out in Record folios 209-10.

It reads as follows:

"An act to ratify certain acts and ordinances of the Mayor and Common Council of the City of Los Angeles.

"The People of the State of California, represented in senate and assembly, do enact as follows:

"Section 1. The following acts, contracts and ordinances of the Mayor and Common Council of the City of Los Angeles are hereby ratified and confirmed: The contract and *lease* for the care and maintenance of the Los Angeles City Water Works, entered into and made between the Mayor and Common Council of the City of Los Angeles, on the one part, and John S. Griffin, Prudent Beaudry and Solomon Lazard on the other part, dated the twentieth (20th) day of July, eighteen hundred and sixty-eight,

(1868); and also the ordinance confirmatory of the same, passed July the twenty-second (22nd), eighteen hundred and sixty eight, which contract and ordinance are recorded in the office of the County Recorder of Los Angeles County, in Book One of Miscellaneous Records, pages four hundred and twenty-eight (428) to four hundred and thirty-one (431);" (here follows certain other ordinances and deeds not affecting the contract in question).

At the time of the passage of this act, the contract of 1868 had been formally assigned to the Los Angeles City Water Company [Record folios 190–2].

However, as already explained, the Company was organized in the month succeeding the date of the contract, and thereupon proceeded with the construction of the works and the performance of the other obligations imposed on lessees and those original lessees did nothing in performance of the contract.

In fact, the evidence showed that the contract had been obtained by the lessees for themselves and associates, with the intention of immediately forming a corporation under the act of 1858, and of having that Company carry out the agreement.

The Constitution of California, in existence at the date of the contract, provided [Article 4 Sec. 31] as follows:

"Sec. 31 Corporations may be formed under

general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

In San Francisco v. Spring Valley W. W., 28 Cal. 493, *supra*, it was determined that a special act of the Legislature, granting a water franchise in the City of San Francisco to private individuals, with the condition that the act should not take effect until those individuals should organize themselves into a water company, was, in effect, a grant to a corporation of a corporate franchise, and had the effect of creating a private corporation within the inhibition of the constitutional provision just quoted.

The case was thoroughly argued, and the opinion of the Court contains an exhaustive review of the cases in California and other States upon the subject; and it was held that the Constitution aimed at the prevention of the conferring of franchises upon private corporations and was not intended merely to prevent the simple creation of such corporations.

The Court dwelt upon the fact that, if it were competent for the Legislature to give special powers to corporations already created, the constitutional provision would become nugatory, as corporations could be created under general laws without any powers, and then special

powers and privileges could be bestowed by special statutes.

The same principle was established in the cases of Spring Valley W. W. v. Bryant, 52 Cal. 132, and San Francisco v. W. W. 53 Cal. 708, wherein it was held that a special statute, providing for a board of water commissioners to fix rates in the City of San Francisco, was unconstitutional, so far as the act attempted to provide a mode for fixing water rates to be charged by Water Companies different from that provided for establishing rates to be allowed to other Companies formed under the general law.

In Oregon Valley R. R. Co. v. Plumas Co., 37 Cal. 364, (decided in April, 1869,) it had been held that the Legislature could not authorize the County to grant special privileges to a private corporation; and this was confirmed in Waterloo Turnpike Co. v. Cole, 51 Cal. 384, (decided in 1876.)

Counsel for appellees cite the case of California Tel. Co. v. Alta Tel. Co., 22 Cal. 398, as having established a rule of property in holding that it was competent for the Legislature to confer a franchise upon a private corporation by special act.

By reference to the report of that case, it will be found that a grant by the Legislature of a franchise to private individuals was involved,

and that the Supreme Court was then composed of three justices, only two of whom joined in the decision and only one of whom placed the decision upon the ground that the constitutional provision in question did not apply.

We, therefore, have an opinion by one out of three judges, and the case affords no authority for the proposition contended for by appellees.

So far as a rule of property is concerned, the case in 37th Cal. 364 was decided before the passage of the special act of 1870, and therefore controlled the construction of the constitutional provision under consideration.

In addition to the subsequent cases, to which we have referred, there was a prior case decided in 1856, that of Low v. Marysville, 5 Cal. 214, which decided that if it were possible to consider a municipal corporation in the light of a private corporation, so far as its transacting the business of a private corporation was concerned, it was not competent for the Legislature to grant to the municipality by special act a special power or privilege with relation to such business.

The Court say: "For as it would have been in violation of the constitution to create an incorporation by special act, for other than municipal purposes, it follows that it would be equally unconstitutional to confer special powers on a corporation already created."

The question is settled in California, and there is no case holding to the contrary.

The case of People v. Stanford, 77 Cal. 371, involved the acquirement of a street railroad franchise by a street railroad corporation, by assignment from the original grantees of the State, and there is nothing in that case which militates against the doctrine established in 48 Cal. 493.

Counsel for appellees argue that the act should be treated as one vesting power in the City to make the contract, and as having effect by relation as of the date of the contract, and the Court below so held; but this contention cannot be sustained.

The act does not purpose to vest in the City the power generally to make contracts with reference to providing a supply of water, but attempts to confirm a particular contract, and is exactly of the same nature as if an act had been passed prior to the execution of the contract specially authorizing the City to enter into it.

It therefore, falls within the decision in Waterloo Turnpike Co. v. Cole, 51 Cal. 381, *supra*, holding that an act of the legislature, authorizing a County to confer a turnpike franchise upon a particular corporation, was void as violating the provisions of the old constitution prohibiting the formation of private corporations by special act.

Where the legislature is prohibited from doing an act, it cannot do it through the medium of a municipal corporation.

Cooley Const. Lim. [6th Ed.] 238–9;

Grand Rapids etc. Co. v. Grand Rapids, 33 Fed. 672.

The claim of counsel that the act can be considered as a confirmatory one, and not as operating as an original grant to the Company, is opposed to the rule of law that a void contract cannot be confirmed.

This is not a technical rule, as applied in the present case, but rests on an absolutely sound principle.

This is illustrated by the case of the People v. Law, 34 Barb 509, where it was held that an act of the legislature, confirming a resolution of the Common Council of New York which purported to grant the right to construct a street railroad, had the effect *of conferring an original grant* of power to construct the road.

In that case it was assumed that the Council had no power to grant the franchise, and the Court say that the statute would have been void if treated simply as a confirmatory act.

In Strange v. Dubuque, 62 Iowa 303, this precise question was involved, and it was there decided that where a municipal corporation had no power to grant a franchise to a particular street railroad Company, a statute confirming

an ordinance making such grant was unconstitutional.

In the case of Los Angeles City Water Company v. Stern, decided by the Superior Court, already referred to, the act of 1870 was declared void as being in effect a grant to the Company.

V.

Los Angeles City Water Company Has No Power Under Its Charter to Collect Water Rates Except as Prescribed By the Constitution and Statutes of the State.

According to the stipulation of facts, the Company was incorporated in 1868, as a water company, under the laws of California, which, as we have seen, was the statute of 1858, [Record folios 226].

The Constitution of California, [Art. 4 Sec. 31] at the time of the execution of the contract in question, and at the time of the incorporation of the Company, contained the provision (cited under the foregoing point) that: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

Subsequent to the incorporation of the Los

Angeles City Water Company, a new Constitution was adopted in California, containing the provisions with regard to water rates which have already been set forth, and the act of 1881 was also enacted providing for the carrying out of these constitutional provisions; all of which has been set out in the preceding part of this brief. [pp. 24–6].

As determined in a series of cases, decided in the Supreme Court of California and in this Court, it was competent for the State, either through its Constitution or by statutes enacted by its Legislature, to change the mode of fixing water rates collected by corporations supplying water for public use, to the extent of the resumption by the State of its original prerogative of establishing such rates itself or through the medium of a commission or tribunal provided by the constitution or a statute.

Spring Valley W. W. v. Supervisors, 7 Pacific Coast Law Journal 614 (not reported in Cal. Reports).

Spring Valley W. W. v. San Francisco 61 Cal. 18;

Spring Valley W. W. v. Schottler, 110 U. S. 362;

San Diego L. & T. Co. v. National City, 174 U. S. 740.

The water companies' act of 1858, providing for the fixing of rates by commissioners, ap-

pointed as we have already explained, was the charter of the Los Angeles City Water Company, and this Court and the Supreme Court of California, in the cases above cited, have held that the constitutional provision, prescribing the mode of fixing water rates by the Council or other legislative body of municipal corporations, was, in effect, an amendment of the act of 1858, and that corporations previously organized were bound by the new mode.

Can the Company, then, demand that the water rates shall be fixed in any manner except as provided in its charter?

"The charter of a corporation serves a two-"fold purpose: it operates as a law conferring "upon the corporators the right or franchise of "acting in a corporate capacity, and further-"more it contains the terms of the fundamental "agreement between the corporators themselves.

Sec. 316, Morawetz on Private Corporations, p. 299.

The doctrine is thus expressed by this Court in the case of Thomas v. Railroad Co., 101 U. S. 71:

"We take the general doctrine to be in this "country, though there may be exceptional cases "and some authorities to the contrary, that the "powers of corporations organized under legisla-"tive statutes are such, and such only, as those 'statutes confer. Conceding the rule applica-"ble to all statutes, that what is fairly implied is

"as much granted as what is expressed, it re-
"mains that the charter of a corporation is the
"measure of its powers, and that the enumera-
"tion of these powers implies the exclusion of
"all others."

By the Act of 1858, as modified by the constitutional provision above referred to and the Act of 1881, water companies have the right to collect rates established by the legislative body of the city in which they do business, and they have no right to collect any others.

They owe their existence to the law under which they are incorporated, and it does not lie in their mouth to deny that they are bound by the provisions of that law.

The Los Angeles City Water Company has no power, except as conferred by its charter, and as that charter does not give it the right to collect rates other than those fixed by the Council, the Company cannot claim it, for to do so would be to exercise a corporate function which has been denied to it by the author of its being.

The fact that it has acquired a contract which gave to the grantees and their assigns the privilege in question, cannot alter the case, as the Company had no power to acquire such a right.

It is altogether different from the case of a purchase of land or other tangible property,

which corporations are authorized by their charter to acquire; for the possession of such property does not require the exercise of a corporate franchise.

Several cases have been decided by this Court involving the right of corporations to claim such privileges in conflict with the provisions of their own charters, and it has been uniformly held that the acceptance of a charter from the State and of the benefits accorded thereby, precluded the corporation from denying the validity and binding obligation of the regulations prescribed by such charter.

In St. Louis etc. R. R. Co. v. Berry, 113 U.S. 465, this Court decided that where a railroad corporation was exempt from taxation, such right of exemption could not be transferred to any other corporation, organized under a law which declared that the property of corporations should be taxed.

This doctrine was affirmed in Chesapeake etc. R. R. Co. v. Miller, 114 U. S. 176.

Morgan v. Louisiana, 93 U. S. 217, had determined the question in the same way, and in that case the court pointed out the difference between the ordinary privileges of a corporation which are necessary to enable them to do business, and those special privileges which are not necessary to the existence of the corporation, saying that these latter are personal and incap-

able of transfer without express statutory direction.

To the same effect is Wilson v. Gaines, 103 U. S. 417.

In Stone v. Trust Co., 116 U. S. 307, it was decided that, even with regard to the original corporation, its charter right of fixing its own tolls could be controlled by the State.

The case of Norfolk etc. R. R. Co. v. Pendleton, 156 U. S. 667, involved the right of a railroad company to fix its own freights and fares under the charter of the original Company, which consisted of a general railroad incorporation act providing that they should not exceed certain rates, and that when the Company had realized certain profits, the State could fix the tolls provided that they should be enough to produce a certain interest, and further, that the act should be subject to amendments, etc., except as to tolls; and also, under a special charter of the predecessor of plaintiff in error, by which it was provided that the Company might regulate and prescribe its tolls, not exceeding such as would produce a certain net income. The railroad was built by another company (which would seem to have acquired the rights of the first company by purchase or conveyance). A third corporation was formed by special act to acquire the property of the second company and others, it being pro-

vided that as the stock of such companies should be absorbed by the new corporation, the latter should become vested with all of the rights of franchise and of property belonging to the other companies. The new corporation gave a mortgage on its works, franchises and property, which was foreclosed, and plaintiff in error became the purchaser. The charter of the new corporation provided that it should be subject to all the laws of the state applying to railroad corporations generally, (one of which authorized the rates complained of). It would also seem from the opinion that the new corporation was authorized to acquire or become vested with the franchises of the first corporation, though this may have resulted from the fact that the second corporation had acquired the rights of the first. The charter of the first corporation was to the subscribers, their executors, administrators and assigns. It was held that plaintiff could not claim the right to tolls given to the first corporation, and that the immunity from state regulation of tolls given to the first corporation did not pass, the court saying: "If the original companies did make a contract with the State whereby, until a certain amount of money should be earned, they should have the right to fix and regulate their charges, it is clear that the Alt., Miss, and O. R. R. Co. (third corporation,) accepted their charter with a distinct pro-

vision that the company should be subject to the general laws of the commonwealth, one of which was the very law, then and still in force, which prescribed the tariff of rates enforced in the present suits. It is equally obvious that the Nor. & West. R. R. Co., the plaintiffs in error, by becoming the legal successor to the Alt., Miss. & O. R. R. Co. was brought within the scope of those general laws, and cannot successfully claim immunity under the charters of the previous companies. * * * We have frequently held that in the absence of express statutory direction, or of an equivalent implication by neccessary construction, provisions in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation, or by purchase under foreclosure, to the property and ordinary franchises of the first grantee; that a mortgage of the franchise and property of a corporation made in the exercise of a power given by the Statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation, but to reorganize a new corporation, subject to the laws existing at the time of the reorganization. This we have stated to be a salutary rule of interpretation, founded upon obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore

not to be extended beyond the exact and express requirements of the grant construed strictissimi juris."

The doctrine was adhered to in the case of Covington R. R. Co. v. Sanford, 164 U. S. 587, with regard to the charter of a Turnpike Company.

This doctrine is really in keeping with the rule of law which attends all ordinary contracts, that one claiming the benefit of a privilege must bear the burdens imposed by the contract or law extending it.

Here is a corporation admitting that it has no existence except under a law which provides how it shall claim compensation for the use of water, the furnishing of which is its only business, and at the same time it claims exemption from that provision of its charter; we submit that it cannot do so, and that any action on its part in conflict with the laws of California, (which are to be considered as a part of its charter, so far as they relate to its powers), would be *ultra vires*, and not allowable.

IV.

The Company has Waived its Right to, and is Estopped From Claiming, Equitable Relief Against the Regulation of Rates by the Council, by Acquiescence in Such Regulation Ever Since 1880, and is Guilty of Laches.

The stipulation of facts shows that in each year since and including 1880, the Council, in pursuance of the constitutional provision requiring it to establish water rates, has, by ordinance, established less rates than those which prevailed in 1870, (which are claimed by appellees to be those in existence in 1868). [Record folios 227–438].

No objections were made to the passage of the ordinances of 1880 and 1881, but in 1882, the Water Company protested against the City's establishing rates on any basis other than the contract of 1868; and in each year thereafter, beginning with February 20, 1883, the Company, in pretended compliance with the Act of 1881, filed with the Council a statement showing its general receipts and disbursements for the previous year, together with a list of the consumers and the amount paid by each, and accompanied by a perfunctory protest against fixing rates lower than those provided in the contract. [Record fols. 238–558.]

No other action was ever taken by the Company in insisting upon its rights to collect other rates than those fixed by the Council. [Record folios 216.]

It thus appears that the complainant, Los Angeles City Water Company, has allowed the Council, for 16 years, to establish rates below those which are claimed to have been fixed by the contract, and that they only appeared in the court below for relief a little over two years before the expiration of the thirty year term of their franchise.

We submit that complainants have been guilty of such acquiescence in the action of the Council as to estop them from maintaining the present suit, and that, even if this be not so, their laches, in not sooner seeking an injunction against the infringement of their rights, is fatal.

The rule in such cases is thus briefly laid down in a leading decision on the subject:

"Nothing can call forth this Court of Equity "into activity but conscience, good faith and "*reasonable diligence.*"

Smith v. Clay, 2 Ambl. 645.

A party is precluded from obtaining distinctly equitable remedies by acquiescence in the wrongful doing of another.

Sec. 817, 418-419, Pomeroy's Equity Jurisprudence;

Sec. 17–18, Beach's Modern Equity Jurisprudence.

As stated in the last authority [Sec. 17], the doctrine "is based upon considerations that the "delay has *or may have been prejudicial*, by reason "of the difficulty of proving the facts, or by the "intervention of equities in favor of innocent "persons, or perhaps *from other causes.*"

In the case of Pennsylvania Mutual Ins. Co. v. Austin, 168 U. S. 685, the doctrine in the text was reiterated, and it was held that equity would withhold relief from those whom a state statute deprived of their property without due process of law, where they have delayed the assertion of their claims for an unreasonable time, even if such laches is not pleaded.

In the present case, appellees are endeavoring to prove water rates which existed *in pais* nearly thirty years ago, and the amount of which it would be very difficult, if not impossible, at the present late date, to ascertain; and they have shown their inability to obtain proof of the fact by failing to introduce any testimony which tended to prove what those rates were.

It is a plain case of acquiescence, for the protests which were made as a matter of form, accompanying each statement furnished in accordance with law, cannot change the effect of the Company's act of commission and omission.

The Company simply said that it protested, but it acquiesced in the action of the Council by collecting the rates thus fixed, which were less than those to which it claimed to have been entitled [Record fol. 216].

They may not have lost their legal rights by failure to assert them; and, if this is the case, a court of law is the proper forum in which to enforce those rights, not a court of equity, which assists only the active and vigilant.

Counsel for appellees claim that the reduction in rates was only slight until the two years of 1896 and 1897, when the first suit and the present one were brought to set aside the ordinance; but there is nothing to substantiate this in the record and the contrary is the fact.

The reason for the Company's acqiescence is very apparent when it is considered that it was obtaining its whole water supply up to 1887 from the river, amounting to several hundred inches above the ten inches which the contract permitted the lessees to take, and, from that time down to the commencement of this suit, the Company took at least two-thirds of its water from the surface stream of the river, obtaining the other third from the alleged development which is claimed to have been made by the Crystal Springs Land and Water Company, and which, as shown by the record in the case of Crystal Springs Land and Water Company

et al, vs. City of Los Angeles, now before this Court, is claimed by the City to be an abstraction of the under flow of the river, and of the same character as the waters which were held to belong to the City in the case of City of Los Angeles v. Pomeroy et al., 124 Cal. already cited.

It was evidently the fear that the City would prevent the unlimited use of the river water that induced the Company to acquiesce in the reduction of rates, (if it thought, which is hard to believe, that the Council did not have the power to make the reduction).

Here we have it that the Company was taking an unstinted amount of river water, far beyond the quantity which it had an uncontrolled right to take, and at the same time the Council was regulating rates without regard to the provisions of the contract; and is it not apparent that the Company considered that it was getting an equivalent at least for permitting the reduction of rates, especially as it continued to derive an income out of all proportion to the amount invested, and based really upon the free use of the City's water?

Had the Company been compelled to seek a supply elsewhere an expenditure of millions of dollars would have been required, and it was the interest on the capital, that would have been em-

ployed in such an undertaking, which represents the value of the use of the river water.

And now, the company, while engaged in using this water *ad libitum*, turns around, two years before the expiration of the thirty years term, and tells the City that it must not continue to do that which the council has been doing for 15 or 16 years, although the Company is still obtaining its full water supply from the source which belongs to the City.

VII.

The Water Rates Fixed by the Ordinance in Question were not shown to be lower than those prescribed by the contract, and, if they were, it was not shown that the Company derived a less income under the ordinance than would have been received had the contract rates been allowed.

There is no testimony in the record which tends to show that the rates established by the ordinance of 1897 are below those which were being charged by Griffin, Beaudry and Lazard at the time of the execution of the contract in 1868; nor was there any evidence given concerning the latter rates.

The only thing, which complainants rely on to establish this fact, is the recital in the report of a committee of the Council appointed in 1870

for the purpose of agreeing with the Water Company upon a schedule of water rates to be charged, in which it stated (by the joint committee) "that they have established water rates and charges for domestic purposes, *taking as a guide as near as can be the charges and rates for domestic purposes charged in July, 1868.* That your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows:"

Now, in the first place, this is not a statement of whether or not the rates fixed in 1870 were equal to those which existed in July, 1868, for it might very well have been that the minimum rates of the contract were not adopted, but higher ones fixed.

Of course, if the contract was recognized as binding, the rates would not have been lowered below those which existed in 1868, but they might have been raised.

Again, it is distinctly stated that the charges and rates which were fixed with reference to those which existed in July, 1868, were only for *domestic purposes*, and that the committee had also fixed the rates and charges for *other reasonable objects and purposes*, but not saying that the latter rates were based on those of 1868.

By looking at the schedule, which appears in folios 201–5 of the Record, it will be seen that

there are numerous purposes for which water rates are fixed outside of those strictly domestic.

For instance, bathing tubs in barber shops, use of water in bakeries and boarding schools, water used for building purposes and for fountains, water for horses and for washing carriages, horse troughs, sprinkling of gardens and the front of lots, water for groceries and other business places, water for railroad uses and steam engines, public water closets, and water used in large quantities for other purposes, manufacturing and mechanical, are also specified.

Moreover, the statement contained in this report is simply the hearsay declarations of a committee of the Council, and cannot be held to bind the City or to establish any fact except that such a report was given.

If the rates on July 22, 1868, were higher than those fixed in 1897, it was incumbent upon appellees to prove the fact as to what the latter were by competent testimony, which has not been done.

They have simply proved that *a report was made*, but they have not shown that any of the *statements concerning past events* contained in that report *were true*.

A municipal corporation cannot be bound by the statements of any of its officers concerning past transactions.

1 Dillon Municipal Corporations [4th Ed.] Sec. 237 Note on pages 321–2.

Complainants have thus failed to establish a fact on which their recovery depends, and which is put in issue by the pleadings.

Assuming that the water rates for domestic purposes, contained in the schedule of 1870, were in fact those which were being charged by the lessees at the date of the contract, yet it does not appear that the income of the Company would have been greater if those rates had been allowed and no others authorized by the ordinance of 1897, which is attacked in the present suit.

As before remarked there are numerous purposes, other than domestic, which are prescribed in the schedule of 1870, the rates for which do not appear to have been fixed by the committee with reference to any charges which were being made in 1868, nor does it appear from the report of the committee (there being no other evidence), that any charges were being made for these purposes at the time of the execution of the contract.

Moreover, by inspecting the ordinance of 1897 [Record fols. 28–30], it will be seen that there are some rates allowed thereby for domestic purposes, which may give a greater amount than those prescribed by the schedule of 1870.

For instance, the schedule of 1870 allows two

dollars for every dwelling house, occupied by not more than five persons, and 25 cents for each additional person, without regard to the number of rooms in the house; whereas the ordinance of 1897 prescribes a rate of 50 cents for every dwelling house not exceeding three rooms, and $1.25 for every dwelling house not exceeding 10 rooms, and 5 cents for each additional room over 10 rooms, so that a dwelling house, not occupied by more than five persons, might have to pay a higher rate under the ordinance than under the schedule.

There are also water rates allowed for purposes in the ordinance which are not provided for in the schedule, such as for private fire hydrants, soda fountains, saloons, elevators, halls, warehouses, photograph galleries, book binderies and machine shops, and "other purposes not enumerated" in the ordinance (the charge for which latter general purposes is 75 cents per month), etc.

We have it then that the Company was allowed to charge rates which were not being collected in 1868, and *non constat* but that these additional rates offset the loss which the Company may have sustained in the reduction of rates for domestic purposes, in case such reduction was in fact made.

The stipulation of facts did not admit that the income of the Company would have been in-

creased by the allowance of the rates contained in the schedule of 1870 only, but that if these latter rates had been allowed *in addition* to the others allowed by the ordinance of 1897, the income would have been $50,000.00 larger.

The evidence showed that the income of the Company from all sources was far beyond the revenues which are ordinarily derived from other investments, and there is no complaint that any of the rates fixed by the ordinance are unreasonable or that the Company is prevented from receiving reasonable and adequate compensation for the water which it furnishes to the inhabitants of the City.

In the case of Logansport, etc. Gas Co. v. Peru, 89 Fed. 189, already cited, it was held that where a gas company had collected rates for ten years and made a large profit so as to pay back all the money invested, beside 10 per cent per annum, the City, which had granted the franchise to the Company, could take such past profits into consideration in establishing rates, and was not bound to fix them so as to afford the Company a reasonable interest for the current year on its investment.

So, in the case at bar, the water company has, by the use of the City's water, been able to pay for its works, and in addition to that divided millions of dollars in dividends, and is still entitled to receive from the City the

value of the improvements, which have thus been paid for with the money collected from the citizens, amounting to the further sum of nearly $1,200,000.00.

We submit then that it was incumbent upon the Company to prove that not only were the rates in fact reduced, but that the income which it would have derived from the rates which were being charged at the time of the execution of the contract in 1868 would alone have afforded a greater income than that which was derived from the rates of the ordinance of 1897, and that, in fixing the rates in 1897, the Council was not compelled to adopt the rates of 1868 if all of the rates which were fixed had the effect of producing as great an income as those charged in 1868 would have afforded.

VII.

If the Contract of 1868 is Valid, and the Ordinance of 1897 Reduces the Income of the Company below that Which it Should Receive, the Ordinance is Void on its Face as Being in Conflict With the Federal Constitution, and is no Cloud on Complainants' Title.

The courts of California are required to take judicial notice of all statutes, private as well as public.

Section 1875 Code Civil Procedure.

The special act of April 2nd, 1870 in effect sets forth the contract, and therefore that instrument will be taken judicial notice of.

There was nothing being done by the City under the ordinance in question which interfered with appellees, in any way, in the collection of rates which they might have been entitled to receive under the contract; no attempt was made to prevent them from managing their property as they pleased; nor was the City or any of its officers interfering with that property.

The ordinance did not single out the Los Angeles City Water Company, nor is there any thing contained therein which shows that the Council intended to assert that the contract was invalid or that the Company had not the right to charge the rates which were in existence in 1868.

The Council was merely discharging a duty imposed on it by the Constitution and the statute of 1881, and it had no jurisdiction to determine what persons or corporations were, by reason of holding special contracts, exempt from the regulation of water rates provided for by those laws.

It had no authority to declare that the Los Angeles City Water Company should not be governed by the prescribed water rates, as its duty was to fix general water rates, and whether any particular person or corporation could

charge other rates, was a matter with which it had no concern, but the right was to be asserted by the privileged individual or corporation in the proper mode.

If the Company had a valid contract, it should have gone on and collected the rates authorized by that instrument.

Its remedy was to disregard the ordinance, as stated in the case of Austin v. Austin etc. Asso. 87 Tex. 330. [47 Am. St. Rep. 114], cited by appellees; in which case it was held that, where an ordinance not only prohibited the cemetery association from using its grounds for burial purposes, but also forbade the public from making use of them, the remedy was to enjoin the execution of the ordinance; but it was said that if the association alone had been prohibited, its remedy would have been to disregard the ordinance, and defeat the prosecution for its violation.

In Spring Valley W. W. v. Bartlett, 16 Fed. Rep. 615, it was held that the passage of an ordinance, establishing water rates in San Francisco, which would have the effect (as claimed) of impairing the obligation of a contract between the State and a Water Company (embodied in the water companies' act of 1858 above mentioned), would not be enjoined by injunction, as the ordinance would be void on its face by reason of its unconstitutionality and there being an ade-

quate remedy in law against any attempt to enforce it.

The same doctrine was declared by Justice Field in Alpers v. San Francisco, 32 Fed, 503, in which he refused to grant an injunction against the execution of a contract which had the effect of impairing the obligation of a former contract entered into between the City and the complainant.

In Murphy v. East Portland, 42 Fed. Rep. 308, the Court refused to enjoin the passage of an ordinance providing for the making of a contract with a water company in violation of law, it being said that the ordinance was not self-executing, and that the remedy was to prevent the levying of illegal taxes which would have to be raised to carry out the scheme.

In Stevens v. St. Mary's etc. School, 144 Ill 336, [36 Am. St. Rep. 438], an injunction was refused to restrain the commissioners of a county from passing a resolution to enter into an illegal contract or ordering a claim thereon to be paid, and it is there said that this will be done only when it is necessary to prevent irreparable injury.

The only ground on which the appellees base their claim to relief in the present case is that, if the ordinance is valid, and they violate its provisions, the City can enforce a forfeiture of the franchise and works.

As a matter of fact, the dreaded forfeiture cannot very well occur in view of the contractual relations which exist between the City and the Company, by virtue of which the City is the real owner of the distributing plant, subject to a lien and right of possession for the protection of such lien on the part of the Company.

This was so held in the case which is referred to in appellees' brief, City of Los Angeles vs. The Los Angeles City Water Company, 124 Cal., at page 385.

In a case which was brought a comparatively short time after the execution of the contract, the Company's attorneys took the position that it was only an agent of the City without any ownership of the water works, and this position has been sustained in the case in 124 Cal. above cited.

See City of Los Angeles vs. Los Angeles City Water Company, 40 Cal. 638.

Therefore, the constitutional provision, with regard to the incurring of a forfeiture by the charging of higher rates than those fixed by the Council, cannot apply here.

But even if it could, we submit that this would be no reason for interference by a court of equity.

If the forfeiture would be incurred, it would only be by reason of the fact that the Company is not entitled to the claimed exemption, and therefore it would have no right to question the

ordinance; in other words, it is in no danger of the forfeiture if it is entitled to collect the rates of 1868, and therefore cannot be harmed by the constitutional provision, and, on the other hand, if it is not entitled to those rates, then a forfeiture would be only a just penalty to be inflicted.

The fact is that the Company wants to have a mere theoretical question determined, for it is obvious that it could not have obtained a final decree in time to have assured it of the validity of the contract as to the right to collect the rates charged in 1868, for, before such final decree could have been obtained, or rather before such decree would have become final, the year would have passed, as has actually happened.

The decree of the lower court would not be any guaranty that the contract was in fact valid, because such decree might be reversed on appeal, and consequently the Company would be in the same position, substantially, after such decree was rendered as it was at the time of the commencement of the suit; and the facts of the case show that this is true, for the Company has gone right on collecting the rates prescribed by the ordinance of 1897, and has not attempted to collect any others.

In addition to what has already been said, it may be remarked that the decree declares the whole ordinance void; whereas, there were other water companies engaged in supplying water to

the inhabitants of the City at the same time, and who could not claim exemption under the contract of 1868, if there was any.

It appears from the bill of complaint that the East Side Spring Water Company was engaged in that business, and *non constat*, but that there were other persons or corporati ns also supplying water (which is actually the fact), and therefore, the ordinance was applicable to them and should not have been annulled.

It also appeared from the stipulation of facts [Record fol. 226], that the original territory of the City, at the time of the execution of the contract of 1868, embraced only 36 square miles, but that, since that time, the limits had been extended so as to add from 10 to 15 miles of additional territory, and that the Water Company had extended its system beyond the old limits into the newly added portions.

Whatever may be said concerning the applicability of a contract, giving privileges within the limits of municipal corporations, to territory added to the City, there can be no doubt but that this is a matter of legislative intention at the time of the extension of the City's limits; and, therefore, if it appeared that the Legislature did not intend that the privileges given in the contract should apply to the portions of the City which were thus subsequently added, such a law declaring that the privileges given in the

contract shall not be applicable to territory not originally embraced in the City, could not be considered as impairing the obligation of the contract.

When the contract of 1868 was made, there was nothing in the law which declared that the exemption should apply to subsequent additions to the City, and, consequently, appellees assignors were not entitled to claim that the privileges accorded by the contract should extend beyond the old limits.

Most of the new additions to the City were made after the Constitution of 1879 was adopted, and therefore, there was a law in existence, at the time that the City limits were extended, declaring, in effect, that the exemption from reduction of water rates should not apply to the extension.

VIII.

The Company was Engaged in violating the Contract of 1868 by Taking Water From the Los Angeles River, and is Therefore not Entitled to Specific Performance of the Contract.

The contract in addition to conceding the use of the waterworks and the right to lay pipes, etc., concedes to the lessees "the additional

right to take water from the Los Angeles river at a point above or near the present dam, provided, always, that the said parties of the second part, their heirs, executors, administrators or assigns, shall at no time take from said river for the use of said waterworks more than ten inches of water, without the previous consent of the Mayor and Common Council of said City; and that they will, within sixty days from the date hereof, select a point from which water will be taken from said river." [Record fols. 184–5]

The contract further on contains this provision:

"Provided, always, that the rights and privi-"leges by these presents conceded to said "parties of the second part do not embrace, to "any extent, or have any reference to the water-"works of said City, used for the purposes of "irrigation, or affect in any manner any rights "of irrigation, either existing at present or "which may exist hereafter, except as to the "ten inches of water, as hereinbefore provided. "And it is expressly stipulated and covenanted "that said parties of the second part shall not "dispose of any water for the purpose of irriga-"tion, but shall only take from said river the "water necessary for domestic purposes, as above "specified." [Record fol. 187]

In October, 1896, the City required the Company to attorn to it and to agree to pay a rental of forty per cent of the gross rates collected by

it for supplying water for domestic purposes (being the identical rental that the Company had agreed to pay to its creature, the Crystal Springs Land & Water Company, for water pretended to have been developed by the latter company), or to desist from using the same, but the Company refused either to attorn or to pay the rental, and went on taking the usual quantity of water, amounting to from 400 to 1000 inches, against the orders of the City [Record fols. 220–3].

It is claimed on behalf of the Company that the term "ten inches" does not mean ten inches measured under a four-inch pressure, but refers to some indefinite quantity, the amount of which has been agreed upon between the parties, by the Company's taking, on the one hand, and the City's permitting the taking, on the other, of an amount of water corresponding to the needs of the Company; and that, if this contention is not well founded, then the City has given its consent, within the meaning of the contract, to the Company's taking as much water as was required for the purpose of operating the works as they existed in October, 1896, (when the City gave notice to the Company), and is estopped to withdraw such consent by reason of the fact that the Company, relying on it, has gone on and constructed the waterworks for the purpose of utilizing this water.

With regard to the first proposition, namely, that by limiting the amount of water to ten inches the City did not really restrict the lessees at all, on account of the indefiniteness of the term, we think that the contrary is the case, and that if ten inches meant nothing, then, logically, the lessees were prohibited from taking any water without the consent of the City; for the contract, in effect, purports to give the right to take only ten inches, (unless the lessor's consent be obtained), and therefore, if ten inches meant nothing, the lessees had no right to take any water.

In entering into the contract, the City had to exercise some judgment as to the amount of water which was to be taken by the lessees, and, as it is apparent that some limitation was intended, the provision for taking any water at all is void if the language used is intelligible.

The principal authority in support of the extraordinary position of counsel is the case of Dougherty v. Haggin, 56 Cal. 552, which involved a verdict in which the amount of water was described as being so many miner's inches, without further specifying the pressure or in what way the measurement was to be made, and it was held that this was defective for a verdict or judgment.

But there is a great distinction between a judgment and a contract, for, in the latter, the

intention of the parties is to be deducted, not only from the writing itself, but from the circumstances under which it was executed and the situation of the parties; in other words, the intention of the parties controls, while a judgment must speak for itself.

The term "four inches measured under a four inch pressure," does not fully describe the amount of water, which that term indicates, to one who is nnacquainted with such matters; and to the mind of a well educated person who has never lived in that section of the west where this mode of water measurement prevails, the language would convey no meaning.

It would be necessary to explain to such a person that one inch of water, measured under a four-inch pressure, meant a quantity of water continually flowing through an aparture one inch square in the side of a reservoir of still water, the center of which aperture was located four inches below the surface of the water.

In some places the four inches, vertical height, are measured from the top of the orifice, and there may be other questions in regard to the fall of the conduit inserted in the orifice to convey away the water, and the thickness of the board or other side of the reservoir in which the hole is cut, all which may cut some figure in the quantity of water which will be discharged.

Then again, when more than one inch is to be

measured, the question might arise as to whether two inches of water means two seperate inches measured through two different apertures, or a quantity passing through an aperture one inch deep and two inches wide, in which latter case, by the removal of a proportional part of the friction, the quantity would be increased; and so on, indefinitely, showing that the measurement depends upon the custom of the country in which it is used.

The contract is not void on its face, in speaking generally of ten inches of water, and when the Company attempts, under this provision, to claim 400 to 1000 inches, measured under a four inch pressure, in a lease of 10 inches, it is incumbent on it to show that such greater quantity is meant, which was not done in the present case.

We understand, in fact, that a miner's inch means one inch measured under a four inch pressure, but that there is a variation in the amount, owing to the fact that, in some localities, the four inches is measured from the centre of the orifice, and in others from the top; but this would undoubtedly be good in a contract, if supplemented by evidence of the meaning attached to it by the usage in the particular locality.

The term "inch of water" can have no meaning unless it be considered with reference to a measurement under four inch pressure, as

already explained, and this Court will take judicial notice of the fact that the expression was in common use in California from very early times, and long before the execution of the contract in 1868.

The Civil Code of California, which was adopted in the session of 1871-2 (Sections 1410–1422) contained a title upon the appropriation of water rising on public lands, and one of the provisions (Section 1415) is that the party intending to appropriate the water shall specify in his notice of appropriation the number of inches measured under a four inch pressure.

This chapter was put into force by special act in May, 1872, but it had been prepared by a code commission appointed several years before.

The very use of the term "inches" in Section 1415, *supra*, shows that it was a well recognized one, for if it had not been some additional language would have been required in order to show what was meant.

Whether the measurement should be made from the center of the orifice or from the top, and whether the ten inches should be measured through one hole one inch deep and ten inches wide, or through ten different holes each one inch square, can make no difference, as appellees cannot, by the exercise of any ingenuity or casuistry, evolve

400 to 1000 inches of water measured under a four-inch pressure from ten inches of water.

It is claimed by appellees that inasmuch as the ten inches of water would not have been sufficient to supply more than 1000 inhabitants out of the 5000 people, who were living in the City at the date of the contract, it is apparent that the contract could not have intended to limit the appellees to ten inches measured under a four-inch pressure.

It is manifest however, that the intention was to limit the quantity to some extent, and not to give the right to take an unlimited amount, for there would have been no sense in inserting the restriction if the lessees were to have the privilege of taking to the extent of the needs of the water system.

The probability is that the lessees never contemplated that the City would increase to any considerable extent, and the subsequent growth of Los Angeles from 5000 to 100,000 population was, doubtless, never dreamed of by them.

The lessees may have had some other water source in view, to which they would have recourse in case the City chose to exercise its privilege of withholding consent to the taking of more than the limited amount, and this is the actual fact, for the Company, as alleged in the bill, acquired a piece of water-bearing land

known as the Crystal Springs Tract, and it was supposed that this would be sufficient.

As shown in the record of the case of Crystal Springs Land and Water Company, et al, v. City of Los Angeles, now pending before this Court on appeal, the Company, or its successor Crystal Springs Land and Water Company, did attempt to make a development of water on this same Crystal Springs Tract, and claims to have so developed some 600 inches of water.

With regard to the other proposition that the parties have interpreted the term to mean as much water as was needed, by the Company's using that much with the consent of the City, the provision of the contract, which gives the lessees the right to take, with the consent of the City, an unlimited amount of water, is a sufficient answer; for the user of the amount of water which the Company has diverted during the term of the contract is to be referred to this provision, coming, as it does, strictly within its terms.

The rule, that the interpretation placed by parties on a contract controls, does not apply to the acts of authorities of municipal corporations.

National W. W. Co. v. School Dist., 48 Fed. 523.

But it is absurd to say that the parties did not, in fact, intend to impose any restrictions when they declared that the lessees should not take

more than ten inches, and it is equally absurd to say that, where the City acquiesced in the using of all the water that was necessary to supply the works, it was because the parties construed the ten inches to mean the amount so used, when the Company was expressly given the right to make use of that amount with the consent of the City.

So, with reference to the claim that the City, having once given its consent to the present use of the water, could not retract that permission and prevent the further diversion, we maintain that this privilege was inherent in the contract.

The evident and plain meaning of the contract is that the consent shall be a *continuing one*, for the language is that the lessees shall "at no time" take for the use of the water-works more than ten inches, without the "previous consent" of the City, and that they would, within sixty days, select the point from which the water should be taken from the river.

It is evident that the parties meant that, before any water should be taken, the consent of the City should be had for the particular period of time during which the lessees should use it, thus requiring a continuing consent; and that the moment that the City refused such consent the right of the Company to make the diversion would cease.

It is certainly a forced construction of the language to say that, if the City consented to the Company's using the water during a particular period of time, the consent would extend over the future indefinitely; for it cannot be said that there was a previous consent to the user for any subsequent period of time when the consent had been given only for a prior period.

No express consent is shown, but the City merely passively suffered the Company to use water without restriction, owing to the fact that, if the Company had been prevented from diverting the water, the City would have had its supply cut off.

The Company simply took the water, relying upon the inability of the City to prohibit it, for the latter had placed its waterworks in the hands of the former, and was thus disabled from making use of the water.

The authorities, cited by counsel for appellees, and by the Court below, do not bear them out in any way in their contention, to uphold which it would be necessary to say that the City could part with its rights to the river waters by estoppel when it was disabled to do so by conveyance.

Ever since the adoption of its charter of March 26th, 1874 [Statutes 1873–4, p. 633], the City has been disabled by express statute from parting with its rights to the river water, but

even if this statutory prohibition had not existed it would still have had no power to part with any of its rights, as shown by the authorities cited in the latter part of Point II.

The population did not exceed 11,000 in 1880, and doubtless was less than 10,000 in 1874; and at the rate of one inch per hundred people, the quantity of water then used could not have exceeded 100 inches, whereas the Company was, at the time of the filing of the bill, using 400 to 1000 inches of the surface stream and 600 inches of the underflow.

The City held the waters in trust for its inhabitants for municipal purposes, and this right it could not dispose of, nor could its title be divested, either by adverse occupation or by estoppel *in pais*.

The authorities cited by appellees in their brief and by the Court below, are based upon licenses which contemplated the vesting of a right for a time as to which the license was enforced, or involved a parol grant or agreement to convey, followed by part performance entitling the licensee to compel a conveyance of the legal title.

In none of them was it decided that the owner of property was estopped from revoking a license or consent to use his real property, where it is agreed that the user will be made only with his consent; nor do these or any other cases

hold that where an individual or corporation is without power to make a conveyance or other disposition of his or its property, such conveyance or disposition can be effected by estoppel *in pais*.

The City of Los Angeles had no power under the law to dispose of its water rights, and it, therefore, could not be estopped by any acts or acquiescence of its officers.

But even, in cases where persons *sui juris* are concerned, a license to use real property, where the understanding is that no absolute right for any definite period is intended to be given, can always be countermanded.

"A license is an authority to do a positive act, or series of acts, on another's land without possessing any estate therein."

1 Washburne Real Property, marginal p. 398.

The general rule is that a license may be revoked at any time at the pleasure of the licensor.

Emerson v. Bergin, 76 Cal. 201.

The general rule, as settled by the weight of authority, is that an executory license is revocable at the will of the licensor, even though the licensee has expended money on the faith of the licensor, and that, too, without refunding the expenditure.

Potter v. Mercer, 53 Cal. 673.

"Another class of cases where the license may be revoked, is where the act licensed to be done is to be done upon the land of the licensor, and if granted by deed would amount to an easement therein. If such license be by parol it may be revoked as to an act thereafter to be done, even though in order to enjoy it the licensee may have incurred expenses upon the premises of the licensor."

Washburne Real Property, marg. p. 400, et seq.

In Goddard's Law of Easements (Bennetts ed. 1880) page 471, it is laid down: "A license is also irrevocable if the licensee, acting upon the permission granted, has executed a work of a permanent character, and has incurred expense in its execution. This rule of law appears to be based upon the injustice which would be inflicted upon the licensee if, after he had laid out money and had executed a permanent work, the licenser was permitted to revoke his license and make him destroy his work, and so lose the money expended, or if he were allowed to treat him as a wrong doer and recover damages for the very act for which he gave permission."

But the American editor adds (pp. 472–5) that it is generally agreed that a parol license, sufficient in terms to create an easement, if in a deed, is irrevocable although executed by the

licensee; and adds that some early cases seem not to have given full force to this view.

He also says (p. 472): "The authorities generally referred to on this subject show that the rule sometimes laid down in the books, that a license executed cannot be countermanded, is not applicable to licenses which, if given by deed, would create an easement, but only to licenses, which, if given by deed would *extinguish* or *modify* an easement. They also show that the distinction, sometimes taken in the books, between a license to do acts on the licensee's own land and a license to do acts on the licensers land is the same distinction that is made between licenses which, if held valid, would create and licenses which extinguish or modify an easement."

"An easement always implies an interest in the land on or over which it is to be enjoyed. A license carries no such interest. The interest of an easement may be a freehold or a chattel one, according to its duration; whereas, whatever right one has in another's land by license may, as a general proposition, be said to be revocable at will by the owner of the land on which it is to be enjoyed."

Washburne's Easements (4th ed.) 6 (marg. p. 5).

"These (easements), being interests in land, can only be acquired by grant, and

by deed, or what is deemed to be equivalent thereto, a parol license being insufficient for the purpose." Id. 27 [Star p. 18].

"And this [power of revocation] extends to all acts to be done on the land of the licensor, so far as the same have not been executed, even though the licensee may have incurred expenditures of money upon the land of the licensor, upon the faith of such license."

Id. 28 [Star p. 19].

The author then goes on to say [28–9, Star page 19] that the law of the several States is as stated, so far as applies to unexecuted licenses, but that there is an exception in some States in case of executed licenses, where the licensee has incurred expense in executing them, when equity will hold for purposes of remedy that such shall be deemed an executed contract; but that in most of the States the doctrine prevails that no permanent estate in land can be created by parol, and that the licensee holds his privilege strictly at the will of the licensor. "But the distinction * * * between a license to do an act upon the licensor's land, and that to do it upon the land of the licensee, should not be overlooked; since the last, when executed, is not revocable."

Id. 29 [Star p. 19].

The editor then adds [p. 29–30]: "The doctrine that equity will interfere in some cases of

oral license to prevent great damage arising to the licensee from the revocation of a license appears to be gaining ground. Two at least (New York and Connecticut) of the States cited above as adhering to the old common law doctrine have fully accepted the equitable rule, and others which are not mentioned above have also decided in the same way. The principle is that where two persons have entered into a complete, sufficient and legal contract for a license, which contract is not only fully founded upon a *valuable consideration*, but of which the terms are defined by satisfactory proof, and accompanied by acts of part performance unequivocally referable to the supposed agreement, equity will regard such a contract for a license *as creating an easement*, and will enforce the easement either by compelling the grantor to give a deed of the easement, or by restraining him from interfering with the grantee in his enjoyment of the right acquired by the contract. The terms of the contract, however, must be plain and definite. *If they are indefinite, as if it is doubtful whether the license is to be for life or at the pleasure of the grantor or otherwise, equity will not enforce the agreement; or if the evidence is too vague to establish any agreement, or if the acts of part performance are not so clear, definite and certain in their object and design as to point exclusively to a*

complete and perfect agreement, of which they are a part execution."

At page 352 [Star p. 243], it is said that equity will in some states "enforce executed licenses, though by parol, if granted upon a consideration or upon the faith of which money has been expended, if the licensee would be without adequate compensation if the license were revoked."

"This doctrine (that a license to do an act on "the licensee's land, which would have the ef- "fect of destroying an easement on such land "in favor of the licensor, cannot be revoked) "does not extend to what are called natural "easements, like the flow of a stream of water "through the licensee's land into that of "the licensor. A license to stop or divert "it upon the licensee's land is just as revocable as "if the act was to be done upon that of the "licensor. * * * But until executed, a parol license "may be revoked."

Id. 727 [star page 560].

A multitude of cases are cited in the text in support of the doctrine therein laid down, and it will be found that all of them proceed upon the theory that a license is never irrevocable where it appears to be intended to continue during the pleasure of the lioensor, and that the licensee cannot make a license irrevocable by imprudently expending money upon the hope and ex-

pectation that the license will not be countermanded.

One who recklessly engages in the construction of works involving a large expenditure of money, without securing the right from the owner of property necessary to be utilized for the undertaking, will not be allowed to secure to himself the same indefeasible right that he would have had by obtaining a conveyance assuring the needed privileges.

In the case at bar the Company never asked for the consent of the City to the use of the water needed for the works, evidently under the fear that a condition of sharing the water rates with the municipality would be imposed.

The situation was simply this, that the Company was deriving a revenue from the waterworks system, (the principal part of which was the river water), sufficient to pay for the construction of all of the works and to afford a handsome profit besides, and it could therefore lose nothing by finding itself in the possession of works, paid for with the rates already collected, even if it should be deprived of the future privilege of making use of the river water without stint and without price.

The Company did not construct the works on the faith of being allowed to use the river water, *but in performance of its contract to do so.*. Suppose that the city had refused to give its con-

sent at the beginning of the contract, would this have absolved the Company from procuring a supply elsewhere.

In order to constitute an estoppel by conduct the party claiming the estoppel must have placed himself, in some respect, in a worse position than he otherwise would have done.

Bowman v. Cudworth, 31 Cal. 153.

The Company was enabled, through the position which it occupied, to dictate to the City and to prevent the use by the latter of its water.

The City could not enforce a demand against the Company to refrain from using the river water, as there was no means of distributing the supply except through the works already in existence; and the City could not take possession of the Company's property, but was bound to allow its own property to be used.

It may be asked, then why did the City attempt to revoke its implied consent to the use of the river water by the Company?

The reply is this, that the Company had already commenced a suit to set aside the ordinance establishing rates for the year 1896–7, and it was, therefore, thought only proper that, if the municipality had the legal right through the exercise of its reserved power of forbidding any use of the river water over the very small quantity of ten inches allowed by the contract, to prevent the collection of exorbitant rates, it was

only right and just, in the interests of its citizens, to do so.

Besides this, the Company had, by reason of its having established the only water plant for the supply of the greater portion of the City, been enabled to go on, year after year, collecting revenues derived from the use of the City's water, while the latter was powerless to prevent it, and it was considered that the interest of the City required its officials to attempt, at least, to force the Company to pay over some part of these revenues.

Every provision of the contract in favor of the Company has been utilized by it to the fullest extent, and the corporation has stood upon its legal rights at all times; and it seems very strange if the City, on the other hand, would not be allowed to take advantage of the provision in its favor, which was inserted in the contract with the full knowledge and consent of the lessees, by which the Company could be forced to pay some compensation for the use of the water.

That the Company was not intended to take the water for the original small population of 5000 or 6000, without paying anything therefor, is shown by the exaction of a rental of $1500 per annum; and when the quantity was increased a hundred fold, why should not the rental have been increased in proportion?

In addition to the authorities referred to in the text books already cited, we refer the Court to the following authorities, holding that licenses with respect to real property can be revoked, even after the licensee has incurred expense on the faith of the license.

Morse v. Copeland, 2 Gray, 302.

Wood v. Edes, 2 Allen, 578.

Mason v. Holt, 1 Allen, 45.

Houston v. Laffer, 46 N. H., 505.

Crosdale v. Lanigan, 129 N. Y., 60 4[29 N. E. 824].

Hathaway v. Y. W. L. & P. Co., 44 Pac. Rep. 896.

Wheeler v. St. J. etc. Co., 2 Mo. App. Rep. 1309.

Jensen v. Hunter, 41 Pac. Rep. 14.

It is only in exceptional cases that an estoppel can be invoked against a municipal corporation.

Clunie v. Sacramento, 120 Cal. 29.

It is claimed in appellees' brief that the Supreme Court of California, in the case of City of Los Angeles v Los Angeles City Water Company, 124 Cal. 368, approved the ruling of the court below in the case at bar that the City was estopped to retract its consent to the continued use of the river water by the Company; but, from an examination of the former case it will be found that the question was not involved.

That suit was for the purpose of appointing a

receiver to take possession of the water works which had been constructed by the Company under the contract of 1868, and to collect the water rates.

The *nisi prius* Court refused to appoint a receiver of the works, but did appoint one to collect the rates.

The Supreme Court held that the City was not entitled to possession until payment or tender of the value of the works, and had no right to interfere with the contracts for the sale of water which had been made by the Company with the rate-payers, and, for these reasons, reversed the order appointing the receiver.

The question concerning the right to the water of the river was not involved, as the City sought to obtain possession only of the distributing system and not of the water.

On petition for rehearing, the Supreme Court practically struck out everything that had been said with regard to the City's right to the water and in effect held that it owned the waterworks, subject only to a lien on the part of the Company with the right of possession to enforce the lien.

Can the complainants maintain this suit to enforce the obligations of an executory contract where they are violating a substantial dependent covenant of the same contract?

This suit is in the nature of a bill for specific performance of the contract, and is therefore

governed by the same rules applying to such suits.

"An injunction restraining the breach of a "contract is a negative specific enforcement of "that contract. The jurisdiction of equity to "grant such injunction is substantially coinci- "dent with its jurisdiction to compel a specific "performance. Both are governed by the same "doctrines and rules; * * ."

Sec. 1341 Pomeroy Equity Jurisprudence.

"The doctrine is fundamental that either of "the parties seeking a specific performance "against the other, must show, as a condition "precedent to his obtaining the remedy, that he "has done, or offered to do, or is then ready and "willing to do, all the essential and material "acts required of him by the agreement at the "time of commencing the suit, * * ."

Sec. 1407 Id.

We add that, in the case of Santa Ana Water Co. v. S. B. Ventura 56 Fed. 339, cited by appellees, the franchise was granted to and held by private individuals at the time of the passage of the confirmatory statute.

In Stein v. Mobile, 49 Ala. 362 (which would appear from the report to have sustained the grant of a water franchise under general power to a city to provide a water supply), the franchise was confirmed by the Legislature, as is shown in Stein v. Bienville W. Co. 141 U. S. 67, involving the same franchise.

We respectfully submit that the decree should be reversed on each of the grounds we have specified.

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WALTER F. HAAS,
LEE & SCOTT,
Of Counsel.

APPENDIX.

Los Angeles City Water Co., vs. E. L. Stern, et al.—Plaintiff seeks by this action to obtain a decree enjoining defendants from erecting a system of water works and from supplying the City of Los Angeles and its inhabitants with water.

In support of its right to such a decree plaintiff by its complaint alleges that it is the owner of the exclusive right to furnish the inhabitants of the city of Los Angeles with water under special franchises granted by the city authorities to certain parties and assigned by them to plaintiff and by reason of an act of the Legislature approved April 2, 1870, ratifying the grant by the city.

Plaintiff further alleges its compliance with all the conditions of its franchise, and its expenditures of large sums of money thereunder, and that defendants threaten to construct a rival system and thereby seriously impair the revenue of plaintiff from its water works.

The contract and ordinances under which plaintiff claims its exclusive franchise are made a part of the complaint and copies thereof annexed as exhibits.

Defendants meet the complaint by a general demurrer, and upon the argument thereof both sides have presented at length and with great learning a large number of points involving grave questions of constitutional law and have supported their respective views by the citation of a very great number of authorities.

Prior to the adoption of the constitution of 1879, the right to construct a system of water works and supply water was dependent upon a grant from the sovereign power either directly or through a municipality.

But the right was extended to all persons or companies under certain conditions by section 19, article XI of the Constitution

"Sec. 19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual or any company duly incorporated for such purpose, under and by authority of the laws of this state, under the direction of Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connection therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants, either with gaslight or other illuminating light or with fresh water for domestic and all other purposes, upon the condition that the municipal

government shall have the right to regulate the charges thereof."

The purpose of that section may be easily gathered from the language, as well as from a general knowledge of the condition of affairs in any city where a corporation has control of the entire water supply and by the exercise of its political influence may prevent the grant of a franchise to any competing company.

The purpose was to prevent in the future any monopoly in the hands of private parties or corporations. The right is not limited to cities in which the water works are not owned by the municipality, but it is also extended to cities where the public works are not controlled by the municipality.

The complaint in this case alleges that the city of Los Angeles owns and controls public works for the supply of water but as the particular mode in which those works are operated is set out in the complaint, and shows that they are not operated by the city, or in its possession, but are held by the plaintiff, it is clear that they are not owned and controlled by the city; and any individual or company can construct its system of water works unless there is some limitations on such right, occasioned by the existence of any exclusive franchise in others.

That the provision of the constitution was self-executing, and did not depend upon legislation to put it in operation was expressly determined by the Supreme Court, in the following language:

"That privilege is expressly granted by the section of the constitution cited, subject to the direction of the Superintendent of Streets or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages and indemnity for damages, and upon the condition that the municipal government shall have the right to regulate the charges thereof. The purpose of this provision was thus explained by the gentleman at whose instance it was inserted in and became a part of the constitution: 'It gives to any individual, as well as to any incorporated company, the right to the use of the streets for laying down pipes for the supply of gas and water or either. I think that the objection that was taken to the section as formerly introduced was well taken—that it should not be limited to corporations; that any individual, for the public good, should have the right to use the streets for laying down pipes for supplying water or gas. It is in the public interest that it should be conceded, and it prevents monopoly in any sense. It also provides that the city authorities may make a regulation requiring all work to be done under the supervision of the Superintendent of Streets.

and also, if any damage should be likely to occur, they may, by security or otherwise, guard against it. . . .

"Then it provides that the city and county shall have the right to regulate the price to be paid by the inhabitants for the gas and for the water. This is also a necessary regulation, I think against the abuses of monopoly. Now, in Los Angeles, we have a gas company with a monopoly for twenty years, and several parties have endeavored to get the privilege for laying down pipes in the streets for the purpose of supplying the city and competing with this company, but the company has always had sufficient influence in the municipal government to prevent this being done, and this company has a prospect of exclusive right for twenty years to come. Now, I submit to the convention that this is a great abuse of public authority and that it ought to be corrected. We have, also there, a water company that claims the monopoly, and the private individual who did succeed in laying down pipes and is to some extent supplying the city with water in opposition to the monopoly, is threatened constantly with suits and injunctions, and if this thing goes on we will have a monopoly, not only of water and gas, but of all domestic necessaries, and then we will have some company peddling it by the tin cup full. It is time this abuse was corrected, and, therefore, I offer this amendment'—which "amendment" is the clause of the constitution now under consideration. (Debates Cons. Con., Vol. 2, p. 1075.)

"We have quoted at length the remarks accompanying the introduction of the provision, for the purpose of showing that the members of the Constitutional Convention had distinctly put before them the evils intended to be remedied, and the purpose of the enactment; and thus informed, they adopted it. Yet we are asked to hold in effect, that after all, the whole matter rests where it did before—with the Legislature. This we cannot do. Nor, under our construction of the provisions in question, do we discover any indication of a return 'to the doctrine of the Dartmouth College case,' nor any fostering of monopolies but, on the contrary, the most manifest intent to prevent them as respects the important subjects treated of—gas and water. By the adoption of those provisions the people asserted their unwillingness to leave the entire subject in the hands of the Legislature, and in the particulars already indicated, declared the rule that should govern, in the organic law itself, and gave to the Legislature the 'regulation and control' in all other respects." People vs. Stephens, 62 Cal., p. 209.

It is clear from the remarks of the author of the section who was the late Judge Volney E. Howard, a lawyer of great learning and thoroughly familiar with the status of the plaintiff's contract with the city of Los Angeles), that he construed the section to include within its purview the city of Los An-

geles; and it seems probable that the word "controlled" was used with the purpose of covering the circumstances existing in this city with reference to the water works.

If, however, at the time of the adoption of the Constitution of 1879 there existed a valid grant to the plaintiff in this case of an exclusive franchise for the sale of water in the city of Los Angeles, then the constitutional provision conferring upon any person or corporation the right to construct a system of water works in any municipality where no such public works are owned and controlled by the municipality would be inoperative as against such right, because such provision would be in violation of the Constitution of the United States, as under it no state can impair the obligation of a contract by her organic law or by legislative enactment.

That the sovereign power of a state can enact an exclusive franchise in the absence of any provision of its constitution forbidding the same has been established by the decisions of the Supreme Court of the United States in the slaughter-house cases and in the New Orleans gas and water cases. The exclusive privilege in the slaughter-house cases was sustained by a divided court, upon the ground that it was a police regulation and that the Legislature had the power to grant the exclusive privileges tested in those cases. The minority of the court dissented from the view of the majority, upon the theory that the Legislature was interfering with the carrying on of ordinary vocations and establishing a monopoly, and thereby violating the provisions of the thirteenth and fourteenth amendments to the Constitution of the United States, which protect from hostile legislation of the states the privileges and immunities of citizens of the United States. It was subsequently held however, that while the Legislature could, as a police regulation, grant the exclusive franchises conferred by the slaughter-house acts, that such legislation, being under the police power of the state, was subject to the control of subsequent Legislatures, and that such legislation could be repealed without impairing the obligation of a contract, as one Legislature could not surrender any portion of the police powers of the State. (Butchers' U. S. H. & L. S. L. Company vs. Crescent City L. S. L. & S. H. Company, 113 U. S. Supreme Court Reports, page 746.

But the rule with regard to the grant of exclusive privileges for the supply of gas or water rests upon an entirely different principle, as laid down by the Supreme Court of the United States. The Supreme Court of the United States, in the case of the New Orleans Gas Light Company vs. Louisiana Light & Manufacturing Company, 115 U. S., 650, say:

"We have seen the manufacture of gas, and its distribution for public and private use, by means of pipes laid, under legis-

lative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety.

"It is to be presumed that the Legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the Legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, that work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable, either that the cost of supplying the city and its people would have been made in some form, a charge upon the public, or that the public would have been deprived of the security in person, property and business which comes from well-lighted streets."

And, in the case of New Orleans Water Works Company vs. Rivers, 115 U. S., 674, the Court says:

"This case is, therefore, controlled by the decision just rendered in New Orleans Gas Light Company vs. Louisiana Light and Heat Producing and Manufacturing Company. The two are not to be distinguished upon principle; for, if it was competent for the State, before the adoption of the present Constitution, as we have held it was, to provide for supplying the city of New Orleans and its people with illuminating gas by means of pipes, mains and conduits, placed at the cost of a private corporation in its public ways, it was equally competent for her to make a valid contract with a private corporation for supplying by the same means pure and wholesome water for like use in the same city. The right to dig up and use the streets and alleys of New Orleans for the purpose of placing pipes and mains to supply the city and its inhabitants with wa-

ter is a franchise belonging to the state, which she could grant to such persons or corporations, and upon such terms, as she deemed best for the public interest. And as the object to be attained was a public one, for which the State could make provision by legislative enactment, the grant of the franchise could be accompanied with such exclusive privileges to the grantee, in respect of the subject of the grant, as in the judgment of the Legislative department would best promote the public health and the public comfort, or the protection of public and private property. Such was the nature of the plaintiff's grant, which not being at the time prohibited by the constitution of the state, was a contract, the obligation of which, cannot be impaired by subsequent legislation, or by a change in her organic law. It is as much a contract, within the meaning of the Constitution of the United States as a grant to a private corporation for a valuable consideration, or in consideration of public services to be rendered by it, of the exclusive right to construct and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below a designated point."

Both the above cases hold that the provision of the Constitution of Louisiana against monopolies would not affect the exclusive franchises granted before the adoption of the Constitution. It will, therefore, be observed that both cases are directly applicable to the question in this case; and that, if there was no provision in the Constitution of California restricting the valid grant of an exclusive franchise for the supply of water to the city of Los Angeles, and such an exclusive franchise was granted by the State, or by the municipality by virtue of power delegated to it by the State prior to 1879, that the rights of plaintiff thereunder would not be affected by the constitutional provision in the State Constitution above cited.

It becomes necessary, therefore, to construe the contract under which plaintiff claims this exclusive privilege, and determine whether it undertakes to grant such an exclusive franchise; and, if it does, whether there existed any provisions under the old Constitution which rendered such grant invalid.

Defendants argue that the contract under which plaintiffs claim does not undertake to grant any exclusive franchise, and that the subject matter dealt with is the waters of the Los Angeles river alone, and does not affect the construction of any system seeking to supply the inhabitants of the city of Los Angeles with water from another source.

The strongest clause of the contract with reference to the exclusive privilege is the following: "And the said party of the first part hereby covenant and agree to make no other lease, sale, contract, grant or franchise to any person or per-

sons, corporation or company, for the sale or delivery of water to the inhabitants of said city for domestic purposes during the continuance of this contract."

Defendants argue that the contract has for its subject matter the sale and disposition of the waters of the Los Angeles river alone; that the supply of water granted by the lease was such that it could not be reasonably expected that it would be sufficient to furnish water to all the inhabitants of the city of Los Angeles during the period of the continuance of the lease.

While it is true that the principal portions of the contract are with reference to the lease of the water works owned by the city and of a water right in the river for the period of the lease; yet the whole contract, construed together, shows that the lessees were bound, under its terms, to supply all portions of the city with water for domestic purposes; and were required to construct such a system as would secure to the inhabitants of the city a constant supply for domestic purposes, and to construct reservoirs of sufficient capacity for that purpose; and were required to extend their pipes "as fast as the citizens desiring to be supplied with water for domestic purposes will agree to take sufficient water to pay ten per cent per annum on the cost of extending such pipes through the streets now supplied wih water." While the supply was limited to ten inches of water the contract seems to indicate that it was anticipated that that grant would be increased in quantity by the authorities of the city should it be necessary.

The provisions of the clause above cited are very broad, and none of the authorities cited by counsel for defendants justify the Court in limiting its meaning to the waters of the Los Angeles river. While the words "lease, sale, contract and grant" might be so limited, the word "franchise" carries with it a much broader meaning, and includes all the rights granted by virtue of which a party can furnish water to a city. There is no limitation anywhere confining it to the particular waters mentioned in the contract, and the only limitation upon it is that it applies only to the sale or delivery of water for domestic purposes, and that it is without prejudice to rights already granted. That the parties understood it to be very broad in its nature is shown by the fact that a subsequent clause is inserted specially excepting from its meaning the water works of the city used for the distribution of water for the purposes of irrigation.

In the case of Stein vs. Bienville Water Supply Company 34 Fed. Rep., 145, cited by counsel, the franchise used the phrase, "The sole privilege of supplying the city of Mobile with water from Three Mile Creek;" and the Court, in discussing it, says: "The subject matter of the agreement was the supplying of water to the city of Mobile, and while it is clear the primary

object in view was to secure an adequate supply of pure, wholesome water, it seems to me equally clear from the language used in the contract, in view of the circumstances under which it was made, that the intention was to grant Stein the sole privilege of supplying the city with water from Three Mile creek and from no other source. Throughout the whole agreement the exclusive right granted Stein is thus described: 'The sole privilege of supplying the city of Mobile with water from Three Mile Creek.' No other source seems to have been thought of.

Another clause in the agreement is that Stein shall have power and authority to conduct the water from any part of Three Mile creek. This creek, as the source of supply, was distinctly agreed on and specifically named. If the intention was to grant the sole privilege of supplying water from any and all sources, why use the qualifying words 'from Three Mile creek?'"

In this case, if the city had intended to limit the exclusive privilege to waters from the Los Angeles river, the limitation would certainly have been made by qualifying the words in the clause cited. Other sources of water must have been known to exist at that time within the region surrounding the city.

In the case of the Gas-light Company vs. the City of Saginaw, 28 Fed. Rep., p. 528, the question involved was as to whether a contract granting "the exclusive right to light a city with gas for thirty years" was impaired by a subsequent contract with another company to light the streets with electricity, and the court held that it was not.

In the case of the Omaha Horse Railway Company vs. Cable Tramway Company, 30 Fed. Rep., p. 324, the pleaintiff had an exclusive grant of a right to build, erect and operate horse railways in the city of Omaha, and sought to enjoin the defendant from the construction of a cable road; and the Court held that the language of the contract would not be extended by implication to include any railway system other than horse railway, as specifically mentioned in the contract.

In the case of Bartram vs. the Central Turnpike Company, et al., 25 Cal., the Court held that the grant of a franchise was not exclusive unless expressly made so by the grant itself.

The case of the Bridge Proprietors vs. Hoboken, 1 Wallace, p. 116, referred to by counsel for defendants as a strong case, goes no further than the other cases above mentioned. In it the Court holds that the construction of a railroad bridge did not interfere with plaintiff's exclusive right to the maintenance of a toll bridge, for the reason that the railroad bridge, although called by the name "bridge," was a structure entirely different in character from that maintained by plaintiff; that it did not directly interfere with the business of revenue of

plaintiff, and that the only effect of the granting of an injunction would be to divert the line of the railway; and that whether the bridge should be constructed in the place proposed by defendant or elsewhere, the effect upon the traffic over plaintiff's bridge would be the same.

The cases cited by counsel, and many others examined by the Court establish the rule, well recognized by the Courts, that when an exclusive franchise is claimed the Court will not, in the construction of the contract, exercise any liberality whatever toward the party claiming it, and will not extend its meaning in any way whatsoever by implication. If there be any ambiguity the benefit of all doubt will be given against the claim of an exclusive franchise.

The sections of the Civil Code cited by counsel, it will not be disputed, fix the law with regard to the interpretation of contracts, and are a condensation of the law as it existed prior to their adoption, as laid down by the courts both of the United States and England as to the construction of contracts; but those rules apply only to cases where there is an ambiguity, and that proposition is expressly laid down in the Civil Code, which provides that:

"Section 1637. For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied."

"Section 1638. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

"Section 1639. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title."

In this case the clause of a contract with regard to the exclusive character of the franchise does not appear to the Court to be in any manner ambiguous, or require the application of any rule for the purpose of construing it other than the understanding of the express meaning of its language. There is no provision in the contract in conflict with it; but the other provisions indicate that it means just what it says, and that it was not the intention of the parties to limit its meaning.

Construing the contract, therefore, as the grant of an exclusive franchise, it becomes necessary to pass upon its validity. The doctrine of estoppel, laid down in the cases cited by counsel for the plaintiff, has no bearing in my opinion, upon this action. If the contract be valid the doctrine of estoppel in no way benefits the plaintiff; if the contract be void from the beginning, then in a case like this, the doctrine of estoppel cannot give it validity.

The cases cited by counsel for the plaintiff are those in

which a city has been held liable upon its bonds, although they were issued without proper authority. But the circumstances of these cases are quite different from the one at bar. In the former the city has received into its treasury money obtained by the sale of its bonds, and good faith requires its return to the proper owner, who has paid it without consideration. But in such a case as this, if a portion of the contract be unconstitutional, the party making it contracts at his peril, for it is his duty to know the law and the rights and liabilities of the city, and one council or legislature, by unauthorized exercise of power, cannot bind its successors.

"When a statute is adjudged to be unconstitutional it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it; and no one can be punished for having refused obedience to it before a decision was made. And what is true of an act void in toto is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never at any time been possessed of any legal force." Code of Con. Lim., p. 224.

Dismissing, therefore, the question of estoppel entirely from the case, I pass to the consideration of the power of the city of Los Angeles to make this contract. Unless that power was conferred by the Legislature upon the city, or its exercise subsequently ratified by an Act of the Legislature which was not obnoxious to a constitutional inhibition, the contract would be invalid.

My attention has not been directed to any statute, nor have I been able to find any, which conferred upon the authorities of the city of Los Angeles power to grant an exclusive franchise and to bind the sovereign power of the State to its perpetuation for the period of thirty years. That such a power cannot be exercised without an express grant from the Legislature is clearly established.

Justice Nelson, in discussing the power of a municipality to grant such exclusive franchises without express authority from the Legislature, says:

"It is a well settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the Act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public. This principle has been so often applied in the construction of corporate powers that we need not stop to refer to authorities.

"Now, looking at the terms of the grant in this case, and giving to them their widest meaning, either separately or in the connection in which they are found, or with the object for which the power was conferred, we find, indeed, a power to establish and regulate ferries within the corporate limits of the town, but not an exclusive power. Full effect is given to the words in which the power is granted, when the simple right is conceded to establish and regulate ferries. If the grant had been made to an individual in the terms here used, the question would have been too plain for argument. In our judgment it can have no wider interpretation, though made to a corporation. It must be remembered that this is not the case where the Crown or the Legislature has aliened to a municipal corporation its whole power to establish and regulate ferries within its limits, as may be found in some of the ancient charters of cities in England and in this country. In those cases the municipal body, in respect to this legislative or public trust, represents the sovereign power, and may make grants of ferry rights in as ample a manner as the sovereign. The error, we think, in the argument for the appellant is in confounding this grant with these ancient charters, or those of a like character. But on referring to them it will be seen that the form of the grant is very different, much more particular and comprehensive, leaving no doubt as to the extent of the power (25 Wend. R. 631, Coster vs. Brush). So here: If the Legislature had intended to confer their whole power upon this corporation to establish and regulate ferries within its limits, or a power to grant exclusive ferry rights therein, a very different form of grant would have been used—one that would have expressed the intent of the law maker to part with the exclusive power over the subject, and vest it in the grantee. In the form used, no such intent appears or can be reached, except by a very forced interpretation, which we are not at liberty to give, according to well settled authority. (11 Pet. 422; 8 How. 569; Mills et al. vs. St. Clair Co. et al., 16 ib., 524, 534; Fanning vs. Gregoire.)"

Mintern vs. Larue et al., 23 Howard U. S.

Supreme Court Reports, p. 435.

The only statute which can be construed to give the city power to grant an exclusive franchise was the act for the incorporation of water companies, approved May 3, 1852; and that only grants by implication the right to give a franchise for a term not exceeding twenty years—a period longer than that during which the plaintiff has enjoyed its present franchise. But the act of April 22, 1858, contains the following provision:

"Section 3. All privileges, immunities and franchises that may hereafter be granted to any individual or individuals, or

to any corporation or corporations, relating to the introduction of fresh water into the city and county of San Francisco, or into any city or county of this state, for the use of the inhabitants thereof are hereby granted to all companies that are incorporated or that may hereafter become incorporated for the purposes aforesaid"; which later act, of course, repeals the inconsistent provision of the former.

The provision of the contract granting an exclusive franchise to plaintiff's predecessors in interest was, therefore, entirely without authority of law, and in violation of the general laws of the State.

But if it has been ratified by a constitutional act of the Legislature, plaintiff's position can be sustained, since the Legislature can validate and confirm the previous act of a municipal incorporation, although it would otherwise be invalid.

The first objection made by the counsel for defendants to the act of 1870, which attempted to ratify the contract, is that it is void, because it embraces more than one subject, and the title does not express any subject, and therefore is in violation of section 25, article 4, of the old constitution, which provided that "Every act shall embrace but one subject, which shall be expressed in the title." The act in question is certainly open to the objection made by defendants, and the authorities cited by them from other States might lead the Court to hold it invalid were it not for the fact that the Supreme Court of our own State has, on several occasions, held that that provision of the old constitution was merely directory, and did not defeat any law passed in violation of its provisions.

The question was first passed upon in the case of Washington vs. Page 4th Cal., p. 388, in which the Court said: "We regard this section of the Constitution as merely directory, and if we were inclined to a different opinion, would be careful how we lent ourselves to a construction which must in effect obliterate almost every law from the statute book, unhinge the business, and destroy the labor of the last three years."

That doctrine was approved in ex parte Newman, 9 Cal. 523.

The question was again raised in the case of Pierpont vs. Crouch, 16th Cal., p. 315, in which the Court approved the doctrine laid down in Washington vs. Page, and added, after the quotation given above from that decision, "The object of the Constitutional provision was to secure some congruity or connection in the subjects embraced in the same statute, but as the provision is merely directory, it can only operate upon the conscience of the law-maker. It creates a duty of imperfect obligation for the infraction of which there is no remedy in the courts."

It was to avoid this doctrine that the provision was in-

serted in the constitution of 1879, declaring it mandatory in all respects.

The objection is also made to the Act of 1870, that it does not ratify an exclusive grant; but, if the grant was exclusive, I take it that the Act of 1870, if valid, ratifies it. Nor do I consider its uncertainty such as to render it void. The reference to the contract as in the Miscellaneous Records of Los Angeles County, and also in consideration of the fact that it was officially adopted by a municipality whose own records are public and presumed to be preserved, make it sufficiently definite in showing what the contract was that the Legislature sought to ratify. That it was a vicious and careless mode of legislation is not sufficient reason to pronounce it void.

It was, however, in my opinion, repugnant to the provisions of section 11, article 1, of the old constitution, which declared "all laws of a general nature have a uniform operation."

The act of 1858, above cited, was a law general in its nature; and the Legislature could not, by a special act, exempt either a person or a corporation from its operation. That act gave to every corporation formed for the purpose of supplying water all the privileges and immunities which were conferred by any municipality upon any other corporation formed for that purpose.

The act of 1870 stands upon precisely the same footing as the act pronounced unconstitutional in the case of the Omnibus Railroad Company against Baldwin, 57 Cal., p. 164. It could, with as much force, have been claimed in that case that the special act repealed the general law so far as it was inconsistent; but the court held otherwise.

The general law provided that all corporations incorporated under the act of 1858 should have the same privileges, immunities and franchises that might thereafter be granted to other individuals or corporations. But the act of 1870 undertook to exempt the plaintiff or its predecessors from the operation of that statute, and to deprive all other corporations of any rights thereunder within the city of Los Angeles. The Legislature had the power to repeal that act, but it had no power to suspend its provisions as to one particular set of persons, or corporation.

The act of 1870 was also void, in my opinion, because unconstitutional and in violation of section 31, article 4 of the old constitution, providing as follows: "Corporations may be formed under general laws, but shall not be created by special act."

By a strict construction of the language of that section it was plausibly argued in other cases that the Legislature, although it could not form a corporation by a special act, might

cases the Supreme Court has laid down a different rule. It appears by plaintiff's complaint that, prior to the adoption of the act of 1870, the original grantee in the lease from the city had assigned all rights thereunder to the plaintiff. That assignment did not vest in plaintiff any right to an exclusive franchise, because the city had no power to grant such franchise; but the assignment did carry with it all actual rights under the contract, which was valid except as to the one provision. The grantors of plaintiff had no rights remaining in them after the assignment, and could take nothing under the subsequent act of the legislature.

Since the provision for an exclusive franchise in the original contract was void, the act of 1870, if it had any effect, was practically a grant by the sovereign power to the plaintiff, a corporation, of an exclusive franchise, and it thereby conferred upon that corporation special and different powers from that given to other corporations by general law. It was not a mere property right, but a franchise, a portion of the prerogatives of the State similar in all its characteristics to the other rights delegated by the State to its corporations, and subject to the same rules.

The case of San Francisco vs. Water Works, 48 Cal., 493, in which the constitutionality of what is known as the Ensign Act was considered, is the leading case upon this subject. By the Ensign Act the Legislature undertook to confer upon certain persons certain powers and privileges and rights upon condition that they would organize as a corporation within a certain period. It was argued in that case that the Legislature did not form a corporation by special act, because it was provided that the incorporation should be made under the general laws. But the Supreme Court held that special privileges were conferred upon the corporation and that the Act was unconstitutional. The Court says in that case: "It was the special purpose of the framers of our constitution to guard against these abuses by providing that 'corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes.' Nor were they content to leave it doubtful whether the Legislature would have power to modify or abrogate these general laws or special acts to create municipal corporations, so as to affect the rights of existing corporations; hence, the constitution contains the further provision that all general laws and special acts 'passed pursuant to this section may be altered from time to time or repealed.' It was intended by this provision to keep corporations within a wholesome legislative control, and to repel the assumption that their rights were held under a contract, which the Legislature was powerless to modify. Under these provisions the

source from which private corporations must derive their powers and immunities is perfectly apparent. They can only 'be formed under general laws,' and can exercise no powers, except such as are derived from general laws. If this provision means nothing more than that the Legislature shall prescribe the mere formula by which a corporate entity may be called into life and may then proceed to confer upon it by special act, at its discretion, extraordinary powers and privileges which it could not afterwards revoke or modify because they were granted under special and not general laws, then, indeed, has the Constitution failed to provide a remedy for the abuses already adverted to. On this construction, when a railroad corporation is once formed under a general law, the Legislature, by special grant, may confer upon it extraordinary powers, greatly in excess of those exercised by other similar corporations. It may authorize it to engage in banking, mining, or any other business enterprise, or to charge higher rates of fare than are permitted to other competing roads. In like manner it might discriminate in favor of a particular banking corporation, or confer special, or perhaps, exclusive privileges on a particular mining, insurance or manufacturing corporation. But on the other, and the true construction of this constitutional provision, all private corporations must derive their powers from general laws, and not from special statutes. The general laws under which they were formed, and such others as shall afterward be enacted, must alone define their rights and powers. On this theory, all private corporations, formed for similar purposes, will stand upon the same footing, enjoy the same rights and be subject to the same burdens, which cannot be increased or diminished except by general laws applicable to all. In harmony with this theory, and accepting this as the true construction of the constitution, the Legislature, at its first session, enacted general laws under which private corporations might be formed, and defining minutely their powers and duties. These laws have been modified from time to time, but have never omitted to prescribe the powers to be exercised and the duties to be performed by the corporation. Nothing short of some imperative rule of constitutional construction would justify us in holding, at this late day, that, though corporations must be 'formed' under general laws, it is nevertheless competent for the Legislature by special grant, to confer upon a corporation once organized, any powers, however extraordinary. We think, on the contrary, that no corporate rights or powers can be conferred by special grant, but must all be derived under general laws."

The same construction is given to section 31, article 4, of the old constitution in the cases of

Waterloo, etc., Company vs. Cole, 51, Cal., 381.

Spring Valley Water Company vs. Bryant, 52 Cal. 132.

The same provision was incorporated in the new constitution as section 1 of Article XII; and our Supreme Court, in case of the People vs. Central Pacific Railroad, 83 Cal., p. 413, discusses that provision.

* * * * * *

The case of the People vs. Stanford, in 77 Cal., simply holds that a corporation can take by assignment from individuals a franchise which they lawfully exercise; but that state of affairs does not exist in this case as far as the exclusive franchise is concerned. The individual grontors of plaintiff never took any such right whatever, never possessed any exclusive franchise, and their assignment did not pass one to plaintiff. If plaintiff has any such right it must have come from the act of the Legislature passed in 1870, after the assignment of the lease to plaintiff.

The plaintiff also claims that section 548 of the Civil Code of California confirmed this contract and established their exclusive right, but I do not so understand it.

There is nothing in that section to indicate that it was intended to be retrospective in effect; but, on the contrary, its language indicates that it was intended to regulate towns and municipalities in their making of contracts for the supplying of the city with water after its enactment; and, though general in form, if it could be construed to have the effect claimed by plaintiff, its effect in this case would be special, and would confer upon a corporation special privileges and immunities, and would exempt it from the uniform operation of general law.

A portion of the section, it might be remarked, is not now in effect, as it is inconsistent with the provision of section 19, article 11, of the new constitution, which permits any corporation to supply water without being authorized by any special ordinance or contract with the city, except in cities where there are public works owned and controlled by the municipality for suppliyng the same with water.

It follows, as a conclusion, that the portion of the lease from the city, under which plaintiff claims, and which purports to grant it an exclusive franchise, is void, because the city had no power to grant such exclusive privilege; and the attempted ratification of such grant by the Legislature was unconstitutional, and therefore void; and plaintiff never has, and does not now, posses an exclusive franchise, for the supplying of the city of Los Angeles with water; and the defendants have the right, under section 19, article II of the Constitution, to construct a system of water works and lay their pipes in the city of Los Angeles; and the demurrer of defendants should be sustained, and it is so ordered.

THE CITY OF LOS ANGELES, [illegible]
vs.
LOS ANGELES CITY WATER COMPANY [illegible]

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

J. S. CHAPMAN,
Of Counsel.

FILED NOV [illegible]

(17,214)

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE CITY OF LOS ANGELES, HERMAN SILVER, Z. D. MATTHUSS, *et al.*,

Appellants,

vs.

LOS ANGELES CITY WATER COMPANY, CRYSTAL SPRINGS LAND AND WATER COMPANY AND S. G. MURPHY,

Respondents.

RESPONDENT'S BRIEF.

In view of the distance from the seat of government, the respondents have been compelled to begin the preparation of their brief in advance of receiving the brief on behalf of the appellants, and for that reason will preface their argument with a statement of the case so far as they deem it necessary to an understanding of the questions involved, saying no more, however, concerning the agreed statement of the facts upon which the case was heard, than merely to refer to it, and calling attention to such

portions as may be necessary, as we proceed with the points and authorities.

Statement of the Case.

On the 22nd day of July, 1868, the city of Los Angeles entered into a contract with J. S. Griffin, P. Beaudry and Solomon Lazard with respect to furnishing water to the inhabitants of the city of Los Angeles by the said parties, and which contract is set out in full in the bill of complaint filed herein. (Tr. p. 3-6, fols. 3-8.)

The principal provisions of this contract of consequence here are, that Griffin, Beaudry and Lazard agreed to pay to the city $1500 per annum, (*Id.* fol. 3, p 3), and surrendered to the city all claims that they then held againt the city for repairs of the said water works and damages, amounting to $8000, or a little more or less (fol. 4), and also should make, as it was said in this instrument, the following improvements about, in and upon the said water works at their own proper cost and expenses, to wit:

"Lay down in the streets of the city 12 miles "of iron pipes of sufficient capacity to supply "the inhabitants of said city with water for do- "mestic purposes, and should erect or cause to "be erected one hydrant to be used as a protec- "tion against fire, at one corner of each cross "street, of said city where the water pipes now "are or may hereafter be laid, by virtue of this "contract, and shall within one year from the "approval of the contract and ordinance, erect "or cause to be erected an ornamental fountain "upon the public plaza of said city, of such "design as the mayor and common council

"should direct, at a cost not to exceed one thou-
"sand dollars, and should, within two years,
"construct at their own cost and expense such
"ditches, flumes, or erect such machinery in
"connection with said water works as will secure
"to the inhabitants of said city a constant sup-
"ply of water for domestic purposes, and shall
"construct reservoirs of sufficient capacity for
"that purpose." (*Id*, fol. 4.)

Further along they agreed that they would make the improvements thereinbefore mentioned and set forth in the following manner, to wit:

"That they will replace all the wooden pipes
"now belonging to said waterworks within one
"year from the signing and approving of this
"contract and ordinance, and that they will ex-
"tend said iron pipes as fast as the citizens de-
"siring to be supplied with water for domestic
"purposes will agree to take sufficient water to
"pay ten per cent per annum interest upon
"the cost of extending said pipes through
"the streets now unsupplied with water. That
"they will within one year from the date hereof,
"place a hydrant to be used as a protection against
"fire at one corner of one street at each of the
"cross streets where the pipes are now laid, and
"will erect hydrants at other street corners ac-
"cording to the terms of this contract as fast as
"the pipes are extended through the streets of
"said city. That they will erect or cause to be
"erected an ornamental fountain upon the pub-
"lic plaza, of such design as the mayor and com-
"mon council shall direct, within one year from the
"date hereof. That they will furnish water for

"the public schools, city hospitals and jails, free "of charge, when the same are near the pipe, the "city furnishing the necessary conduits for that "purpose. That they will make all the improve- "ments herein mentioned and set forth and keep "the same in repair at their own cost and expense "for the said period of thirty years, and return "the said water works to the party of the first "part at the expiration of the said period of "thirty years in good order and condition, reason- "able wear, and the damage of the elements ex- "cepted, upon the payment to them of the value "of the improvements made after the approval "of this contract, to be ascertained as hereinbefore "provided, and to give a bond in the sum of "twenty thousand dollars, conditioned for the "compliance by them with the conditions of this "contract to be approved by the mayor of said "city; and will pay all state and county taxes "assessed upon the said waterworks during the "said period of thirty years." (Tr. p. 5, fols. 6-7).

The consideration which they were to receive for this undertaking was that the said party of the first part for the above considerations and one dollar in hand paid, covenanted and agreed with the said parties of the second part, their heirs executors, administrators or assigns, to deliver and concede to the said parties of the second part, their heirs, executors, administrators or assigns, the exclusive use, control, possession and management of the Los Angeles City Water Works, so-called, together with all and singular, the pipes, flumes, wheels and other personal

property, composing and appertaining to said water works, in any manner whatsoever, with all the rights, easements and privileges and covenants, as described and contained in a certain instrument of lease executed by the mayor and common council of the said city of Los Angeles, October sixteenth, A. D. one thousand eight hundred and sixty-five, to Jean L. Sansevaine, for the period of thirty years from the signing and approval of the contract and ordinance, with the right to sell and distribute water for domestic purpose, to receive the rents and profits thereof, for there own use and benefit, except as herein before provided, hereby giving and granting to the said parties of the second part, their heirs, executors, administrators or assigns, the right to lay pipes in any and all the streets of said city, and to dig and make all necessary excavations for that purpose, and the right of way through, upon and over lands or streets belonging to the said city of Los Angeles with the additional right to take water from the Los Angeles river at a point above or near the present dam; provided always that the said parties of the second part, their heirs, executors, administrators or assigns, shall at no time take from said river for the use of said water works more than ten inches of water, without the previous consent of the mayor and common council of said city; and that they will within sixty days from the date hereof, select the point from which the water will be taken from said river.

"The said party of the first part hereby "covenant and agree with the said parties of the

"second part, their heirs, executors, adminis-
"trators or assigns that at the expiration of
"the period of thirty years from the execution
" of this instrument, they will pay to the said
"parties of the second part, their heirs,
"executors, administrators or assigns the
"value of the improvements made in, about
"and upon the said waterworks in pursuance of
"this contract, the same to be ascertained by
"arbitration, in case the parties cannot agree
"upon the value thereof; the said party of the
"first part and the parties of the second part,
"their heirs, executors, administrators or
"assigns to choose one man each, and the two
"men thus chosen to select a third man, and
"the judgment of the three men thus selected
"shall be final in the premises. And the said
"party of the first part hereby covenant and
"agree to make no other lease, sale, contract,
"grant or franchise to any person or persons,
"corporation or company, for the sale or the
"delivery of water to the inhabitants of said
"city, for domestic purposes, during the con-
"tinuance of this contract, always without pre-
"judice to any rights already granted." (Tr.
"fols. 4-6)

At another part of the contract, there is this provision:

"Always provided that the mayor and com-
"mon council of said city shall have and do
"reserve the right to establish the water rates
"charged by said parties of the second part or
"their assigns, provided that they shall not so
"reduce such water rates or so fix the price

"thereof to be less than those now charged by "the parties of the second part for water; pro- "vided that a certain contract of lease hereto- "fore executed by the mayor and common "council of said city to Jean L. Sansevaine of "said waterworks of date October sixteenth, A. "D. one thousand eight hundred and sixty-five "be surrendered and cancelled up at or before "the signing of this contract; provided always "that the rights and privileges by these pre- "sents conceded to said parties of the second "part, do not embrace, to any extent, or have "any reference to the water works of said city "used for the distribution of water for the pur- "poses of irrigation, or affect in any manner "any rights of irrigation, either existing at "present, or which may exist hereafter, except "as to the ten inches of water as hereinbefore "provided. And it is expressly stipulated and "covenanted that said parties of the second "part shall not dispose of any water for the "purposes of irrigation, but shall only take "from said river the water necessary for domes- "tic purposes, as above specified." (Tr. fols. 7-8.)

It is alleged that the contract of said Sansevaine was surrended as agreed (Tr. fol 9, par. 9, of the bill) and that on the 19th of April, 1870, Griffin, Beaudry and Lazard assigned the contract, for a valuable consideration, to the Los Angeles City Water Company, one of the plaintiffs below. It is then alleged that Griffin, Beaudry and Lazard, and its assignee, the Los Angeles City Water Com-

pany, have performed all the terms and conditions of the contract on their part to be performed; and further alleged that at the time of the making of the contract, the city of Los Angeles was a small town, having not more than five or six thousand inhabitants, nor more than two or three miles of graded streets; but that since the execution of the agreement it had increased in population until there were about seventy-five thousand inhabitants, exclusive of the territory that had been recently incorporated into the city; that buildings of all kinds, business blocks, manufacturing estabments and residences had been constructed in all parts of the city, and the number of houses of all kinds "now being in the said city" was probably at least fifteen thousand; that there had been constructed, for the convenience and use of the inhabitants, since the execution of this contract, about forty school houses for use as public schools, and all other kinds of buildings, hotels, city halls, jails, county court houses, theaters, pavilions and all sorts of edifices; that the street railways and steam railways have increased in number and the extent of their mileage, until there are now probably seventy to one hundred miles of street railways laid in the city, and now being operated, and about seventy five to one hundred miles of graded streets; that parks have been laid out and improved and the increased demand for water in said city had been in greater proportion since the said contract was made and assigned to the said Los Angeles City

Water Company than the increase in population. (Tr. fols. 9-10.)

It was alleged that the Los Angeles City Water Company had extended the iron pipes provided for in said contract as fast as the people of Los Angeles desired to be supplied with water for domestic purposes, and would agree to take sufficient to pay ten per cent. per annum interest upon the cost of extending such pipes through the streets which were at that time unsupplied with water, and that to obtain a supply of water over and above the said ten inches, the company had been compelled to expend a large amount of money, to wit: more than two millions of dollars, in laying down pipes in the streets of said city, to furnish the inhabitants thereof with water, and to furnish water to the city for its public schools, city hospitals and jails, and had laid down over and above the twelve miles of iron pipes mentioned in the contract, about three hundred miles of iron pipe, to be used for those purposes. (Tr. fol. 10.)

It is then alleged:

"That the ten inches of water leased by the "city from the Los Angeles river had long ago "become wholly insufficient to supply the in- "habitants with water; that it had become neces- "sary for the reasons set forth in the complaint "to change the point of diversion, and that the "company had, at immense outlays of money, "purchased the system that was established by "Prudent Beaudry, and known as the 'Beaudry "System of Water Works,' and also the system "established by the East Side Spring Water

"Company, and had purchased, and then held, "certain water rights in the Arroyo Seco, a "stream flowing into the city of Los Angeles "from the northeastern side, and had conducted "the water from the Arroyo Seco into the said "city, and on the eastern side of the Los Angeles "river for the supply of the inhabitants of that "portion of the city; and that the system of "works and water rights are now being used and "operated by said Los Angeles Water Company, "for the purpose of furnishing the city of Los "Angeles and its inhabitants with water, under "the provisions of the contract." (Fols. 10-11.)

It is then alleged in the bill that "about the "22nd of March, 1843, Manuel Micheltorea, then "being the governor of both the Californias, "granted to Maria Ygnacio Berdugo, a certain "tract of land to the north of the city, known as "the Rancho Los Felis, which grant was pre-"sented to the Board of Land Commissioners, "and on the 28th of February, 1854, the claim "was confirmed by that board, and a decree of "confirmation was confirmed by the District "Court of the United States for the Southern "District of California, at its December term, in "1856, and the grant decreed to be good and "valid; that the appeals taken from that decree "were dismissed and proceedings were had under "it and a patent issued on the 18th day of April, "1871." (Tr. fols. 11-12.)

Then follow allegations of a grant by the Spanish government made in 1784 of a certain tract of land to the north of the city, known as the San Rafael Rancho, of the presentation of a

petition for the confirmation of that grant, the confirmation by the Board of Land Commissioners on the 11th of September, 1855, and by the United States District Court on the 4th of June, 1857, and the issuance of a patent on the 28th of January, 1882. (Fols. 12-13.)

It was also alleged that the Los Angeles City Water Company had acquired a tract of land, part of the Rancho Los Felis, and which was known as the Crystal Springs Tract, and had cut a ditch from said Crystal Springs to divert water therefrom to increase the supply of water for the city; that subsequently, the Crystal Springs Land and Water Company was organized, and that tract was conveyed by the Los Angeles City Water Company to the Crystal Springs Land and Water Company, and that the latter company had acquired by purchase from the owners of the remainder of the Los Felis Rancho and from the owners of portions of the San Rafael Rancho the right to enter upon the lands, part of those grants, to develop and collect the percolating waters in the soil upon the said ranchos, and within the said tracts, and that that company did, at enormous expense, make excavations and lay pipes within the said portions of the Los Felis and San Rafael ranchos, and did develop of the percolating waters in said soil about 700 inches, measured under a four inch pressure, which were conducted by the Crystal Springs Land and Water Company to a point connecting the conduits with the system of water works owned by the Los Angeles City Water Company, and that the Crystal

Springs Land and Water Company had become vested with a right to make the said excavations, and to own, take, divert and use the waters which they might by the said work develop and by said pipes divert; and having acquired these waters, the Crystal Springs Land and Water Company did lease to the Los Angeles City Water Company the 700 inches of water, with the right to take the same through the system of works owned by the Los Angeles City Water Company, and supply the inhabitants of the city with the said water; and the Los Angeles City Water Company agreed to pay to the Crystal Springs Land and Water Company 25 per cent. of the gross amount received by it for rates collected within the said city of Los Angeles, for the rent thereof. [Fols. 13-14.]

That at the time these developments were made by the Crystal Springs Land and Water Company, and the conduits constructed, the city had increased in population to such an extent that the acquisition of further water was necessary to enable the Los Angeles City Water Company to perform its contract. [Fol. 14, Par. 14 of the Bill.] That the two companies had, in these developments and constructions, expended about three millions of dollars. [*Id.* Fol. 15.] That these corporations had contracted a bonded indebtedness of $409,000, and had conveyed to S. G. Murphy, one of the plaintiffs below, the properties and water rights in trust to secure the payment of the said bonded indebtedness to the holders of the said bonds,

and that said Murphy still holds the property under a deed of trust, to secure the said bonded indebtedness, which was still outstanding and unpaid. And the Los Angeles City Water Company still holds a lease from the Crystal Springs Land and Water company; that the company was still furnishing the city with water for municipal purposes, free of charge, and its inhabitants with water, for rates. (Fol. 15–16.)

It was further alleged that the same difficulty occurring in the year 1870 concerning what rates were charged for furnishing water to the inhabitants of the city at the date of the contract of July 22, 1868, commissioners were appointed by the city for the purposes of ascertaining and determining that amount, and after an investigation and examination the committee reported and the council accepted the rates set forth in the bill as being the rates charged at the date of the contract; and that it was agreed between the two, that is, the city and the water company, that those rates, thus ascertained by the commissioners, should be aecepted as the rates to be charged by the Los Angeles City Water Company, under the said contract. (Fol. 16, par. 17 of the bill.)

Then is set forth the rates which were thus determined, found on pp. 12–14, fols. 16–19.

It is then alleged that the legislature of the state of California ratified the contract between the city and Beaudry, Griffin and Lazard, by an act approved April 2, 1870, entitled, "An act to ratify certain acts and ordinances of the mayor

and common council of the city of Los Angeles;" and that the same was still in force; that the rates agreed upon by the parties were the rates that were charged at the time of the making of the contract. (Tr. fol. 20, par. 18.

It is then alleged that the city has ever since the making of the contract and the assignment thereof to the Los Angeles City Water Company, recognized its existence, and in every year demanded that the Los Angeles City Water Company perform the various terms and conditions of the said contract on its part, and demanded the erection of fire hydrants at the street corners, and which demands were continued up to the time of the commencement of the action; and that the fire hydrants were demanded at the same time of the passage of the ordinance fixing the rates to be charged by the Los Angeles City Water Company, in the year 1897, and that the company had been, during all the time, and was then, upon the demands of the city, and in accordance with the contract, furnishing water for sprinkling the streets of Los Angeles city, and for all the public uses therein mentioned, free of charge, and the city had been accepting the same by making use of the water so provided, without paying or offering anything therefor; and that the water company had recognized the contract obligation to do and perform all of said things under the said contract. (Tr. fols. 20-21.)

It was further alleged that the water company had no income or revenue from any other source than from these water rates, and was unable to

pay the rental agreed upon, to the Crystal Springs Land and Water Company, nor to continue to extend its pipes, and improve its system to meet the needs of the city, which was then growing at an enormous rate,and that it had been compelled to expend, within the last three years more than $400,000 in laying larger pipes and extending its pipe system to tracts that had before been unsupplied with water, and that its sole source of revenue, with which to pay for such improvements, repairs, maintenance and expenses of administering the system and to pay interest on the bonds issued by it, for the money borrowed for such improvements, expenses, maintenance and repairs, was from these water rates. (Tr. fols. 21-22.)

It is then alleged that in the year 1879, the people of the state had adopted a constitution to take effect on and after the 4th day of July,1879,so far as the same related to the election of officers, and for all other purposes, to take effect on the first day of January, 1880, at 12 o'clock meridian. By the said constitution, it was provided in Art. XIV, as follows, to wit:

"Article XIV. Section 1. The use of all "water now appropriated or that may hereafter "be appropriated, for sale, rental or distri-"bution, is hereby declared to be a public use "and subject to the regulation and control of "the state, in the manner to be prescribed by "law; provided that the rates or compensation to "be collected by any person, company or cor-"poration in this State for the use of water

"supplied to any city and county, or city or "county, or the inhabitants thereof, shall be "fixed annually by the board of supervisors, or "city and county, or city or town council, or "other governing body of such city and county, "or city or town, by ordinance, or otherwise, in "the manner that other ordinances or legisla- "tive acts or resolutions are passed by such "body, and shall continue in force for one year "and no longer. Such ordinances or resolu- "tions shall be passed in the month of Febru- "ary of each year, and take effect on the first "day of July thereafter. Any board or body "failing to pass the necessary ordinances or "resolutions, fixing water rates, where neces- "sary, within such time, shall be subject to "peremptory process to compel action, at the "suit of any party interested, and shall be "liable to such further processes and penalties "as the legislature may prescribe. Any per- "son, company or corporation collecting water "rates in any city and county, or city or town "in this state, otherwise than as so established, "shall forfeit the franchises and water works "of such person, company or corporation, to "the city and county, or city or town, where "the same are collected for the public use.

"Section 2. The right to collect rates or "compensation for the use of water supplied to "any county, city and county, or town, or the "inhabitants thereof, is a franchise and ~~may~~ can "not be exercised except by authority of and in "the manner prescribed by law." (Tr. Fols. 22-23, Par. 21 of the bill.)

Then in the 22nd paragraph of the bill (Fols. 23-25), it is alleged that the legislature of the State of California at its session held in 1881, claiming to be authorized by the said provisions of the constitution so to do, passed an act entitled' "An act to enable the board of supervisors, town councils, etc., to perform the duties prescribed by section 1, of article XIV of the constitution, and prescribing the penalties for the non-performance of such duties". This act did, in its first section, declare that the town council, board of aldermen, or other legislative body of any city and county or city or town, were thereby authorized and empowered, and it was made their official duty to annually fix the rates that should be charged and collected by any person, company, association or corporation for water furnished to any such city and county, or city or town or the inhabitants thereof; and providing that the rate should be fixed at a regular or special session of such board or other legislative body, during the month of February of each year, and should take effect on the first day of July thereafter, and should continue in full force and effect for the term of one year and no longer. And such act further provided that such legislative body of any city and county, or city or town should require by ordinance or otherwise, at least thirty days prior to the 15th of January of each year, that any corporation, company or person supplying water to such city and county, city or town, or to the inhabitants thereof, should furnish to such board or other governing body,

in the month of January in each year, a detailed statement, verified by oath of the president and secretary of such corporation or company or of such person, as the case might be, showing the name of each water rate payer, his or her place of residence, and the amount paid for water by each of such water rate payers during the year preceding the date of such statement, and also showing all revenue derived from all sources, and an itemized statement of expenditures made for supplying water during said time.

And it further provided in the sixth section thereof as follows:

"Rates for the furnishing of water shall be "equal and uniform. There shall be no dis- "crimination made between persons, or between "persons and corporations, or as to the use of "water for private and domestic and public or "municipal purposes; provided, that nothing "herein contained shall be so construed as to "any person, company, association or corpora- "tion to charge any person, company, corpora- "tion or association anything for water fur- "nished them, when by any present law such "water is free."

And it was further provided in section 7 of the act as follows:

"Any person, company, association or "corporation charging or attempting to "collect from the persons, corporations "or municipalities using water, any sum "in excess of the rate fixed as herein- "before designated, shall, upon the complaint of

"such board of supervisors, town council, board "of aldermen, or other legislative body thereof, "or of any water rate payer, and upon convic- "tion before any court of competent jurisdic- "tion, shall forfeit the franchises and water "works of such person, company, association or "corporation to the city and county, city or "town wherein the said water is furnished and "used." (Tr. fol. 25.)

It was further provided in section 8 of the act that any board of supervisors or other legislative body * * * which should fail or refuse to perform any of the duties prescribed by the said act, at the time and in the manner thereinbefore specified, should be deemed guilty of malfeasance in office, and upon conviction thereof at the suit of any interested party, in any court of competent jurisdiction, should be removed from office. (Fol. 25.)

It was further alleged that in 1888, the electors of the city of Los Angeles, in pursuance of the provisions of the constitution of the State of California, authorizing them so to do, adopted a charter for said city, and that said charter was, under the provisions of said constitution, submitted to the legislature of the state of California for its approval, ratification and adoption, and the said charter was, on the 31st of January, 1889, adopted by the said legislature, and it thereupon became and ever since has been the charter of said city, and by section 193 of the charter it is provided as follows:

"The rates of compensation for the use of "water to be collected by any person, company "or corporation in said city shall be fixed annu- "ally by ordinance, and shall continue in force "for one year, and no longer, such ordinance "shall be passed in the month of February of "each year and take effect on the first day of "July thereafter. Should the council fail to "pass the necessary ordinance fixing the water "rates within the time thereinbefore prescribed, "it shall be subject to peremptory process to "compel action, at the suit of any party inter- "ested." (Tr. fols. 25–26.)

It was further alleged that at the time this contract was entered into, and at the time of the assignment of the same to the Los Angeles City Water Company, there was no law of the state of California, attaching or attempting to attach, to an overcharge for the water rates, the penalty of forfeiture of the property of said company, and no such condition or limitation was contained in the grant of the said franchise to the assignors of the said Los angeles City Water Company, nor did any such condition subsequent, for the defeating of the title to the property in such franchises and water works or forfeiting the same to the municipality, ever exist, prior to the adoption of the constitution aforesaid. (*Id.* fol. 26, par. 24.)

It was further alleged that the provisions of the constitution of the state of California attempting to confer upon the legislative body of the city of Los Angeles, the power to regulate the rates to be charged by the said Los

Angeles City Water Company so as to authorize them to make such regulations as to fix a lower rate than that charged at the time mentioned in the said contract, impaired the obligation of the contract, and were in violation of the provision of the constitution of the United States prohibiting any state from passing any law impairing the obligation of contracts; and that the provisions of the said constitution and acts of the legislature were all in violation of the said provisions of the constitution of the United States prohibiting any state from depriving any person of life, liberty or property without due process of law, and prohibiting the said states from denying to any person within their jurisdiction, the equal protection of the laws, and that the attempt in the constitution and the act of the legislature to create a condition in the estate of the Los Angeles City Water Company, in its property, whereby its title is to be defeated, and which condition did not exist at the time it acquired the said property, and was not contained in the grant to its assignors, is an attempt to deprive the Los Angeles City Water Company of its property without due process of law. (Tr. fols. 26 27.)

It is then next alleged that the council of the city of Los Angeles did, at its meeting of February 23, 1897, pass an ordinance regulating the rates and compensations allowed to be claimed by any person or corporation supplying water for domestic and private purposes to the inhabitants of the city of Los Angeles during the year commencing July 1, 1897, and ending June 30,

1898, claiming authority under the provisions of the constitution of the state, and under the acts of the legislature of the state of California and the charter of said city, and by which ordinance the rates to be charged by the Los Angeles City Water Company were fixed at amounts far less than those charged at the date of the said contract, and which were before set forth in the bill, and the copy of the ordinance is set forth in full. (Tr. fols. 27-31; par. 26 of the bill.)

It was alleged that under these rates, the revenues of the Los Angeles City Water Company would be reduced more than 40 per cent below the amount which it would receive at the rates charged in 1868, for the same services, and its ability to make the necessary extensions, and construct the necessary improvements to meet the wants and keep up with the progress of the city, would be greatly impaired, and the amount of rent that the said Crystal Springs Land and Water Company would receive would be 40 per cent less than it is entitled to receive, and that its ability to pay the interest and maintain the operating expenses and repairs and improvements necessary for the proper administration of its system, and to comply with the contract made by its assignors with the said city of Los Angeles, would be greatly impaired, and the said company will not only be deprived of the revenues which it ought to receive, but will be unable to carry on its said business, and to properly perform the contract hereinbefore set forth and the terms thereof on its part to be performed. (Tr. fol. 31.)

It was further alleged that if, when the ordinance went into effect, the Los Angeles City Water Company, should attempt to charge more than the rates so fixed, that your orators are informed and believe, and therefore allege, that the city of Los Angeles would claim that the property of the Los Angeles City Water Company was forfeited to the city, and would attempt to enforce such forfeiture; and that your orators cannot maintain the rights which they possess under the said several contracts hereinbefore set forth, except at the peril of the loss of said property, and the certainty of their being greatly interfered with by the said city of Los Angeles, in their attempts to maintain and operate the same; that the matter in dispute, exclusive of interest and costs, exceeds the sum of $150,000; and there is a prayer for a decree that the ordinance passed February, 23, 1897, fixing the water rates to be charged by the Los Angeles City Water Company to the said city and to its inhabitants, is null and void, and that the same is in violation of the contract rights of the said Los Angeles City Water Company, and of these plaintiffs, and that the council be commanded to regulate the water rates to be charged by the said Los Angeles City Water Company, but in such manner and for such rates fixed by it as that they shall not so reduce such water rates, or so fix the prices therefor, as to be less than those charged at the time of the execution of said contract, and for a decree enjoining the council from fixing the said water rates at any less amount until the determination of the said contract,

and that your orators may obtain the relief prayed for, and all such further or other relief as the nature of the case may require. (Fols. 32-33, par. 28.)

The bill was filed March 4, 1897. (Tr. fol. 33); exceptions were filed to the bill of complaint by the city of Los Angeles, for expunging impertinent matter. (Tr. p. 25, fol. 36); exceptions were also filed by Herman Silver and others composing the council of the city of Los Angeles. (Tr. fols. 38 39.) The city of Los Angeles also demurred to the bill; (Tr. fols. 40-46); Herman Silver and the others composing the council, also filed a demurrer. (Tr. fols. 48-54.)

The court sustained the fourth and fifth exceptions to the bill, (Tr. fols. 55-56), and overruled the remainder; (Fols. 55-58), and see the amended order upon that subject. (Fols. 59-62.)

The court also overruled the demurrer of all the parties. (Fols. 63-66.)

The defendant, the city of Los Angeles, filed an answer, (Fols. 67-91) and the council also answered, (Fols. 92-116.) The replication was filed to both answers. (Fols. 117-120); all of which proceedings are briefly stated. (Fols. 121-123.)

The decree was entered June 20, 1898. (Fol. 124.)

The cause was, in truth, heard upon an agreed statement of the facts set forth in the transcript. (Fols. 181-258.)

The assignments of error are very voluminous, and are set forth in folios 261-279.

The opinion of the court on the final hearing of this cause will be found in the transcript, fols. 127-180, and does itself completely establish the conclusions reached.

Points and Authorities.

I.

The court did not err in overruling the exceptions taken by the appellants to the report of the special master on the exceptions to the bill of complaint. It will be observed that the court sustained the fourth and fifth exceptions to the complaint and overruled the remainder.

Tr. fols. 55-61.

This fourth exception was to paragraph XI wherein the complainants set forth the deraignment of the title of the Crystal Springs Land and Water Company; and the fifth exception was to paragraph XII of the bill, where the allegations are of the same character.

The first exception is to paragraph VIII, in which we set forth the conditions of the city at the time of the execution of the contract and of the increase in population and improvements of all kinds.

Fols. 9-10.

The second exception is to paragraph IX of the bill and which is of the same character.

Fol. 10

The third exception is to the tenth paragraph of the bill where it is alleged that the ten inches of water leased by the city of Los Angeles became wholly insufficient to supply the inhabitants of said city with water, and setting forth the outlays by the Los Angeles City Water Company in acquiring other works and water supplies.

Fols. 10-11.

The sixth exception is to paragraph XIII and the allegations of that paragraph relating to the organization of the Crystal Springs Company, and what it had done in the developing of water, and in making the lease to the Los Angeles City Water Company.

Fols. 13-14.

The seventh exception is to the whole of paragraph XIV, and the eighth to paragraph XV. These both relate to matters of the same character. They allege the increase in population of the city, the necessity for further improvements and further water supply, and the expenditures which had been made in order to construct and obtain a system of works and a supply of water to enable the company to carry out its contract.

Tr. fols. 14-15.

The ninth exception is to a portion of paragraph XVI.

Fols. 36-37.

And it is not very easy to determine from this transcript what portion of the 16th paragraph is supposed to be impertinent, but in truth none of it is. It alleges the contracting of the bonded indebtedness, and that to secure the payment of the same, a conveyance to one of the complainants, S. G. Murphy, was made of the properties and water rights, in trust, to secure the payment of that bonded indebtedness. It refers again to the lease from the Crystal Springs Land and Water Company, and the agreement of the Los Angeles City Water company to pay 25 per cent of its gross receipts from water rates as the rent. It alleges too the continued supply of the city of Los Angeles with water for municipal purposes, free of charge, and the performance of the contract on the part of the Los Angeles City Water Company through all the years that had passed over this agreement; the erection of fire hydrants and the extensions of the pipes; and this through the demands of the city itself; and that up to the filing of the bill, at least, it showed that the company was furnishing, and the city receiving, water for municipal purposes free of charge.

Fols. 15-16.

The tenth exception is to the whole of paragraph XIX. This is principally occupied with setting forth the recognitions of the contract and the assignment to the Los Angeles City Water Company, and the various acts of the city, the demands made upon the company and compliance therewith by the company, all of which

things were demanded because the contract provided for it, and were performed by the Los Angeles City Water Company for the same reason.

Tr. fols. 20-21.

The eleventh and last assignment of error is directed to a portion of paragraph XXVI of the bill, and again it is difficult to discover what portion is objected to. The paragraph is the one in which is set forth the ordinance passed in February 23, 1897, and which is attacked by the bill in this case, and the portion to which this exception is directed must be contained within the closing part of the paragraph, and after the signature of the clerk. As these words "and" and "receive," occur several times, we suppose the paragraph is just before the conclusion, where it is said "and the said company will not only be deprived of the revenues which it ought to receive."

Tr. fols. 36-39.

A glance at the bill in this case will show that none of these exceptions were ever well taken, and that they were properly overruled. But if they had ever possessed any merit, their usefulness has been entirely obviated by the stipulation of the parties. This cause was heard wholly upon an agreed statement of the facts which will be found set forth in Transcript folios 181 to 258, and many of the matters which are attacked in these exceptions, for impertinence, are agreed to in the case, and whether they are relevant and material, and what force they are to be allowed is to be determined upon

the merits of the case rather than upon the exceptions taken to the bill.

II.

The court did not err in overruling the demurrers filed to the bill on behalf of the city of Los Angeles and the council of said city. The demurrer of the city is set forth in folios 40 to 46, and of the councilmen from folios 48 to 54. They do not require a separate treatment, as they raise substantially the same questions. We shall not notice the first ground stated, viz: that the bill does not state such a cause, nor contain any matter of equity entitling the complainants, or any of them, to any relief against these defendants, for that question also is determinable upon the agreed facts in the case, as well as upon the allegations of the bill. The objection, however, made to the jurisdiction of the court over the subject matter and the parties we shall consider here.

Of course it would not have jurisdiction over the parties by reason of citizenship, but the controversy is one arising under the laws of the United States. The bill alleges the making of the contract; that, as a part of that contract, the city agreed not to fix the rates at less than the rates then provided; that the city had the power to make such a contract independently of any act of the legislature ratifying it; that it was subsequently ratified by the legislature; that it had been carried out in every particular by the company; and that both parties had been recognizing its existence and its validity until the period of thirty years had nearly elapsed. Then

we allege the adoption of the constitution in 1879 purporting to authorize the city council to fix the rates, the passage of an act of the legislature assuming to do the same thing, the adoption and ratification of a charter of the city of Los Angeles still essaying to vest this power in the the city, and the exercise of that power by the council, and the passage of an ordinance fixing those rates far below the contract rates, the council claiming the authority so to do under the constitution and laws aforesaid

This made a case for the jurisdiction of the Circuit Court, and it matters nothing how the controversy may be eventually decided, so far as the jurisdiction is concerned. Ordinances of the city passed in pursuance of legislative authority are laws of the state within the meaning of the constitutional provision prohibiting laws imparing the obligation of the contract.

Hamilton Gaslight & Coke Co. v. City of Hamilton, 146 U. S., 258, 265, 266.

Shively v. Bowlby, 152 U. S. 1.

In the last case cited, which was a writ of error to the Supreme Court of Oregon, this court sustained the jurisdiction upon the ground that a federal question was involved, but affirmed the judgment of the Supreme Court of Oregon.

In the first case cited, the court sustained the jurisdiction, but reached the conclusion that the municipal ordinance referred to did not impair the obligation of the contract.

See also Santa Ana Water Co. v. Town of Santa Buenaventura, 56 Fed, 339.

That case is very similar to the present; indeed in principle, it is not distinguishable at all. There the town of San Buenaventura of California entered into a contract with Arnaz, and others by which the board of trustees of that town granted the exclusive privilege of supplying water to the said town unto Jose de Arnaz and others, for the term of fifty years

One of the provisions of that contract was that the parties of the first part (namely, Arnaz and his associates), should have the unrestrained right to establish such rates for the supply of water to private persons, as they might deem expedient, provided that such rates be general.

Id. 341.

The ordinance of that town passed the 15th day of February, 1892, purported to fix the maximum rates for supplying water to the town and its inhabitants, which should be charged by complainant for the year beginning July 1, 1892, and ending June 30, 1893.

Id. 344.

The right to fix these charges was asserted by the board of trustees of the town under the provisions of the constitution of the state of California, and of the act of 1881, which we have before set forth, and Judge Ross in delivering the opinion said:

"It was to carry out these provisions of the "constitution that the legislature of the state "passed the act, approved March 7, 1881, and it "was in pursuance of these constitutional and stat-"utory provisions that the ordinance complained "of was enacted. It is clear that if the contract

"entered into between the town and Aranz and "his associates purporting to confer upon them "and their assigns the exclusive privilege of sup- "plying the town and its inhabitants with water "for fifty years from the date of its execution, "and to secure to them the unrestrained right to "establish such rates for the supply of water to "private persons as they might deem expedient, "provided such rates be general, was a valid con- "tract, and passed, by assignment, to the com- "plainant corporation, the obligation of that "contract was protected by the constitution of "the United States against impairment by any "act of the state, constitutional or statutory."

The learned Judge of the Circuit Court of the Ninth Circuit, for the Southern District of California, (Judge Ross) came to the conclusion that that contract was valid, and that this ordinance did impair its obligations, and overruled a demurrer to the complaint. But without considering the question of whether the contract was or was not valid, or whether the ordinance did or did not impair the obligation of the contract, it is obvious that the case stated by the bill here, as well as in that case, is within the jurisdiction of the Circuit Court.

Jurisdiction is the power to hear and determine; and where the power exists, it is not affected by the conclusions which the court may reach.

If the court below had been of the opinion that the ordinance complained of was not in violation of the contract and had so determined such determination would have been the exercise of jurisdiction, not a denial of it.

As to the third ground of demurrer that several distinct and independent matters and causes which have no relation to each other and in which, or the greater part of which, the defendant was in no way interested, etc.,

Fols. 40-41.

it is sufficient to say that those paragraphs of the bill in which the deraignment of the Crystal Springs Land and Water Company's title was set forth, were stricken out as impertinent under the exceptions of the defendant, it being considered by the court below that all that was necessary for the Crystal Springs Land and Water Company and Murphy to show was that they had an interest in the matters involved in this controversy, and that the deraignment of title was unnecessary. Those paragraphs being out of the bill, there is not anything in it in which the defendant is not interested, and the several plaintiffs, the Los Angeles City Water Company, the Crystal Springs Land and Water Company and S. G. Murphy, are all interested in the rates to be collected by the Los Angeles City Water Company under the provisions of that contract. However, as to the objection to the misjoinder of parties plaintiff, by the stipulation filed in this case, that question is waived.

The tenth paragraph of the stipulation,

Page 119, Fols. 196-197,

is that the defendants in the action waive all questions as to the proper joinder of Murphy and the Crystal Springs Land and Water Company with the Los Angeles City Water Com-

pany, as plaintiffs, and the introduction of any evidence, under the allegations made, as to the character and sources of the waters in the excavations made by the Crystal Springs Land and Water Company, and alleged in the said bill of complaint. And it is stipulated that any decree that may be entered in this case shall neither be conclusive upon the title of either party to the lands, rights of way, waters and water rights and easements of all descriptions mentioned in the bill of complaint herein, nor shall the decree be admissible in evidence in any other litigation between the plaintiffs and defendants, or any of them, upon the question of the title to the said properties, and the decree which may be entered herein shall contain a clause making such reservation. Such decree shall not, nor shall anything contained in this stipulation, be construed as binding or concluding any of the parties hereto in regard to any fact or matter except in regard to the validity of the contract set forth in the bill of complaint, and in regard to the relief expressly awarded by such decree, and said decree shall contain a provision to this effect. This stipulation does not deprive either party of the right of appeal."

Tr. fols. 196-197.

Now the decree entered in the case did follow this stipulation, and was that the contract, in so far as it provides that the city shall not reduce the water rates below those charged on the date of said contract, is valid; that the ordinance of February 23, 1897, fixing the rates

for the following year, did reduce the water rates below those charged on the date of the contract, and impair the obligation of the contract, and that said ordinance was null and void. It was ordered, adjudged and decreed that said ordinance be and the same is hereby vacated, and set aside, and held for naught.

Then follows the portion of the decree made in pursuance of the stipulation that it should not be conclusive upon the title of either party to this suit to lands, rights of way, waters and water rights and easements of all descriptions mentioned the bill of complaint herein, nor shall the decree be admissible in evidence in any other litigation between the complainants and defendants, or any of the them, upon the question of title to said properties.

Tr. fols. 124-125.

In view of the agreed statement of facts and of this stipulation, and the form of the decree, the fifth ground of demurrer that the bill is vague and uncertain, if it ever had any merit, is waived by that stipulation. But it is submitted, in addition, that the bill never was vague or uncertain in any of the particulars set forth in the demurrer, at par. 5, fols. 41-43 of the transcript. They are nearly all constructed upon the notion that it was in some way or other incuumbent upon the complainants to show that the charges fixed by the council were unreasonable. That was not the theory of the bill at all. It was that the contract had provided that the rates fixed by the council should not be less than those charged at the date of

contract. That these ordinances did fix a less rate; that they were passed in pursuance of these constitutional and statutory provisions; and that it is a law impairing the obligation of the contract.

It is in the stipulation agreed, that if the rates so established by the council in 1870, and confirmed by the ordinances of the city hereinbefore set forth, were collected for the year beginning July 1st, 1897, and ending June 30, 1898, the revenue received by the Los Angeles City Water Company from said rates would be more than $50,000 in excess of the amount which would be received under the rates named in the ordinances of Feb. 1897, as set forth in the bill herein.

Tr. fols. 216-217, par. 33 of the agreed statement, p. 133.

Now those ordinances of 1870 and succeeding years will be found from folios 200 to 209, and the proceedings in regard to them, and which we say was a determination between the company and the city of the rates referred to in the contract. If this is true, [and whether it is or not, we shall consider further along,] then it follows from the agreed statement that it is in violation of the contract, if the contract itself is valid.

We do not deny that a contract of this character may agree upon rates so exorbitant that courts of equity would refuse to specifically enforce the contract, but this refusal would be put upon grounds not peculiar to contracts of this character, but applicable to all

alike, viz: that courts of equity will not decree the specific performance of hard and unconscionable bargains; but there is nothing in this case to show that this bargain is one of that character; and there certainly is no presumption in favor of it. It was deliberately entered into; the rates which it referred to were ascertained with still more deliberation, and agreed upon by the parties; and it would have to be an extreme case that would persuade a court of equity to refuse to enforce it under such circumsances, and certainly an extreme case that would incline a federal court of equity to refuse to accord to it the protection of the federal constiution.

It is well settled that in cases of this character, where the laws of a state have committed to a particular tribunal the power and duty of fixing rates, the courts will not interfere with its judgment, unless it is so unreasonable as to amount practically to taking private property for a public use without just compensation, or depriving one of his property without due process of law. It would not be enough to show merely that the profits derived were not such as, in the opinion of the court, one ought to derive from a business enterprise of such a character, for in such case, if any substantial profit is obtainable from the rates, courts do not substitute their judgment for that of the tribunal so empowered, so far as the amount of profit is concerned; hence if this bill had been framed upon the theory that these rates were unreasonable, it would have been necessary, doubtless, for the complainants to have shown such

a state of the case as we have here been referring to; but we say that is not the theory, and that there is a wide step between the lowest rate that might be fixed by the council that would not be interfered with by the courts, and a rate which amounted to a hard and unconscionable bargain; and the very object of the contract in regard to rates, is to protect oneself against the exercise of the almost unrestrained and unlimited liberty of judgment of the council or other tribunal which has the fixing of those rates; and courts of equity will interfere to protect such contracts unless some reason can be shown applicable to contracts generally why they should not do so.

III.

The contract of July 22nd, 1868, between the city and Griffin, Beaudry and Lazard is a valid contract.

(*a.*) The city had power to make the contract in the first instance. On March 11, 1850, the legislature of the state of California, passed an act to provide for the incorporation of cities.

See Statutes of Cal. of 1850, page 87.

By the second section of this act it was provided as follows:

"Whenever any city is incorporated by a special act of the legislature, such act may simply define boundaries of the city and declare it incorporated, in which case, it shall be deemed incorporated according to the provisions of this act; or may declare it incorporated under the

same with such changes as may be specially named."

Id.

At the same session of the legislature, the city of Los Angeles was incorporated by an act passed April 4, 1850, which act provided:

"Section 1. All of the tract of land included "within the limits of the Pueblo de Los Angeles "as heretofore known and acknowledged, shall "henceforth be known as the city of Los An- "geles, and the said city is hereby declared to be "incorporated according to the provisions of the "act entitled, 'An act to provide for the incor- "poration of cities, approved March 18, 1850', "provided, however, that if such limits include "more than four square miles, the council shall "within three months after they are elected and "qualified, fix by ordinance, the limits of the city "not to include more than said quantity of land, "the boundaries so determined, shall henceforth "be the boundaries of the city."

"Sec. 2 of the act simply provides the number of councilmen which shall be seven, and that the first elections should be held on the second Monday of the following May.

Sec. 3 provided that the corporation created by this act shall succeed to all the rights, claims and powers of the Pueblo de Los Angeles in regard to property, and shall be subject to all the liabilities incurred and the obligations created by the Ayuntamiento of said pueblo.

P. 155, Statutes of 1850.

Now in the act to provide for the incorporation of cities, which is thus made applicable to the in-

corporation of the city of Los Angeles, in Sec. 11, it is provided as follows:

"The said city council shall have power to "make by-laws and ordinances not repugnant to "the constitution and laws of the United States "or of this state, to prevent and remove nuisances, "* * * * to cause the streets to be cleaned "and repaired; to establish a fire department, to "make regulations to prevent and extinguish "fires * * *, to provide for the supplying "the city with water; to impose appropriate fines, "penalties and forfeitures for breaches of their "ordinances; * * * to erect and maintain "poor houses and hospitals; to prevent the intro- "duction and spread of diseases; and to pass such "other by-laws and ordinances for the regulation "of the police of such city as they shall deem "necessary; which by-laws and ordinances shall "be published in the manner to be prescribed by "the city council."

Such were the general powers of the city, and powers of the like character conferred upon municipal corporations have been many times held to be ample authority to contract for the supplying a city and its inhabitants with water, and to agree upon the price to be paid therefor.

See the opinion of Judge Wellborn, Tr. pp. 88 *et seq.* and the authorities cited; especially Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 339; Illinois Savings Bank v. City of Arkansas City, 76 Fed 271.

In making a contract of this character the city is not exercising its governmental powers, but its business or proprietary powers. The

purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens.

Ill. Savings Bank v. City of Arkansas City. 76 Fed. 286.

In addition to the statutes referred to, the legislature, on May 3, 1852, passed an act entitled, "An act to provide for the incorporation of water companies. This act in its first section made the provisions of the statutes concerning corporations generally applicable to associations formed for the purpose of supplying any cities or towns, or the inhabitants thereof, with pure, fresh water, and the second section was as follows:

"Any company incorporated for the purposes "specified in the preceding section shall have "the right to purchase or take possession of and "use and hold such lands and waters as may be "required for the purposes of the company, lying "without the limits of the city intended to be "supplied with water, upon making compensation "therefor. The mode of proceeding to obtain "possession of such lands for the use of the "company, in cases where the parties cannot "agree upon a purchase for the use of the com-"pany, shall be the same as prescribed in sec. "17 and 18 of an act to provide for the incorpo-"ration of railroad companies, passed April 28, "one thousand eight hundred and fifty-one.

"Sec. 3. This act shall not give to any "company a right to supply any city with "water unless it shall be previously authorized "by an ordinance, or unless it be done "in conformity with a contract entered into be-

"tween the city and the company; any contracts "hereafter so made shall be valid and binding in "law, but shall not take from the city the right "to regulate the rates for water, nor shall any "exclusive right be granted by contract or "otherwise for a term exceeding twenty years."

Subsequently, on the 22nd of April, 1858, another act was passed, entitled, "An act for the incorporation of water companies." This act after making the act of April 14, one thousand eight hundered and fifty-three, and the provisions of an act entitled, "An act to ammend an act entitled, an act to provide for the formation of corporations for certain purposes," passed April 14, one thousand eight hundred and fifty-three, passed on the 30th day of April, one thousand eight hundred and fifty-five, applicable to corporations already formed or hereafter to be formed, under said acts, for the purpose of supplying any city and county or cities or towns, in this state, or the inhabitants thereof, with pure, fresh water, provided as follows, in section 2:

"Any company incorporated for the purposes "specified in the preceeding section shall have the "power to purchase or to appropriate and take "possession of and use and hold all such lands and "waters as may be required for the purposes of "the company, upon making compensation there-"for. The mode of proceeding, to appropriate "and take possession of such lands and waters "when the parties cannot agree upon a pur-"chase thereof, shall be the same as prescribed "in sections 27, 28 and 29 of an act to provide

"for the incorporating of railroad companies, "passed April 22, one thousand eight hundred "and fifty-three, except that such proceedings "shall be had before the county judge of the "county in which such lands or waters or both "may be situated: provided that all reservoirs, "canals, ditches pipes, acqueducts and all con- "duits heretofore built or that hereafter "may be constructed by any corporation, "formed under this act or claiming the privileges, "rights and immunities herein granted, or any "of them, shall be used exclusively for the pur- "pose of supplying any city and county, or any "cities or towns in this state, or the inhabitants "thereof with pure, fresh water."

Sec. 3 provided that all privileges, immunities and franchises that might thereafter be granted to any individual or individuals or to any corporation or corporations, relating to the introduction of fresh water into the city and county of San Francisco or into any city or town in this state for the use of the inhabitants thereof, were thereby granted to all companies incorporation, or that might thereafter become incorporated, for the purposes aforesaid.

The fourth section declared that such corporation should furnish pure, fresh water to the inhabitants of such city and county or city or town for family uses so long as the supply permits, at reasonable rates, and without distinction of persons, upon proper demand therefor, and should furnish water to the extent of their means to such city and county or city or town, in case of fire or other great necessity, free of charge, and

the rates to be charged for water should be determined by a board of commissioners, to be selected, two by the city or town authorities, two by the water company, and in case the four could not agree to the valuation, then the four to choose a fifth, and if they could not agree, upon a fifth, the sheriff of the county should appoint him, and the decision of the majority of the board should determine the rates to be charged for one year.

As this act covers the entire ground of the incorporation of water companies, it might be doubted whether the act of May 2, 1852, is not repealed by it. But whether it was repealed or not, it had no application to this contract, for that act applied only to companies incorporated under that or some other act; but at the date of this contract, the Los Angeles City Water Company had not been incorporated at all, and the contract was made with Griffin, Beaudry and Lazard in their individual capacity. And even if there were any question upon the other score, the legislature of the state of California subsequently to the passage of the ordinance, of July 22, 1868, by which the city entered into this contract, ratified that ordinance. The act referred to was passed April 2, 1870, and is entitled, "An act to ratify certain acts and ordinances of the mayor and common council of the city of Los Angeles," and is as follows:

"Section 1. The following acts, contracts "and ordinances of the mayor and common "council of the city of Los Angeles are hereby "ratified and confirmed: The contract and

"lease for the care and maintenance of the Los "Angeles city water works, entered into and "made between the mayor and common council " of the city of Los Angeles on the one part, "and John S. Griffin, Prudent Beaudry and "Solomon Lazard on the other part, dated the "20th day of July, 1868, and also the ordinance "confirmatory of the same, passed July 22nd, "1868, which contract and ordinance are re- "corded in the office of the county recorder of "Los Angeles county in book 1 of miscel- "laneous records, pages 428-431; and also two "certain concessions from the said corporation "to William G. Dryden, his heirs and assigns, "concerning rights of way and water, and the "ordinances authorizing the same, passed "February 24, 1857 and December 8, 1857, "respectively, and recorded in the aforesaid "recorder's office, in book 2 of deeds, etc., at "pages 453 and 449 respectively; and a certain "conveyance to Hiram McLaughlin, his heirs "and assigns, from said corporation, dated "August 6, 1858, and recorded in said office in "book No. 4 of deeds, pages 225-226.

"Sec. 2. This act shall be in force from and "after its passage."

See statutes of Cal. 1869-70, pp. 635-636.

This ratifying act is set forth in the agreed statement of the facts.

Tr. p. 128, fols. 209-210.

At the same session of the legislature and on the 2nd day of April, 1870, the legislature passed another act published in the statutes of California of 1869-70, page 645, entitled,

"An act concerning water courses in the city of Los Angeles," the first section of which is as follows:

"The zanjas which are within the limits of "the city of Los Angeles, known as the prin- "cipal zanja, and zanjas No. 1, 2, 3, 4, 5, 6, 7 "and 8 are hereby declared public zanjas, and "the quantity of water which has heretofore gen- "erally flowed in each one of said zanjas is "hereby declared to be the quantity which by "right belongs to each one of said zanjas, and to "the farmers and fruit growers who are benefitted "by their use; provided always that nothing "herein contained shall be so construed as to "effect or in any manner interfere with any "rights, privileges or easements heretofore "granted and conceded to P. Beaudry, John S. "Griffin, Solomon Lazard, their associates or "assigns, by the mayor and common council of "the city of Los Angeles."

See also agreed statement of facts, par. 21, fol. 210.

On the 20th of February, 1872, the legislature of this state passed another act entitled, "An act to amend the charter of the city of Los Angeles," the second section of which is as follows:

"The mayor and common council of the city "of Los Angeles shall have full and complete "control and power over all zanjas, water courses, "water ditches and canals within the city limits, "except the rights, privileges and franchises "heretofore granted and now enjoyed by the Los "Angeles City Water Company, and shall have "power to take by purchase or otherwise land

"for the enlargement of the present zanjas, "canals, water courses and ditches to increase "the number and keep the same in repair, and "in all cases to regulate the use of the same un- "der such ordinances as the mayor and common "council shall prescribe; and provided further "that the privilege of water shall be extended to "the Agricultural Fair grounds adjoining said "city, to the same extent and under the like "regulations as to other irrigators using the same."

Statutes of 1871–2, p. 129, Sec. 2.

It will be remembered that the contract of Griffin, Beaudry and Lazard had been transferred to the Los Angeles City Water Company sometime before the passage of this act.

In 1874 and on March 26.

Statues of 1873-4, page 633, the legislature passed another act to amend the charter of the city of Los Angeles, and in the 28th section of the ninth article, it is provided as follows:

"All acts of the legislature relating to the "said city of Los Angeles and all city ordin- "ances heretofore passed, and now in force, and "not inconsistant therewith, shall be and re- "main in full force after this act takes effect, "and thereafter until repealed by the proper "authority; and all rights vested or liabilities "incurred under any former act of the legisla- "ture applicable to said city or any city or- "dinance, when this takes effect, shall not "thereby be lost, impaired or discharged."

Statutes of 1873-4, page 659.

On March 30, 1878, the legislature of said

state passed another act entitled, "An act to ratify certain contracts and ordinances of the council of the city of Los Angeles," the first section of which is as follows:

"Section 1: The council of the city of Los "Angeles is hereby empowered to contract for "the proper sprinkling of the streets of said "city, or for the supply of water for such pur- "poses, either with the Los Angeles City Water "Company or any other party, and is empowered "to provide for the payment of any compensa- "tion agreed or to be agreed to be paid for such "service, in the same manner that any other "expense on the part of said city is or shall be "provided for."

Statutes of 1877-8, page 849.

For the reference to the statutes in the stipulation, see Tr. Fols. 211-212.

Such is the history of the legislation of the state of California upon this subject. The ordinances of the Council adopted from time to time ever since the contract was executed, are equally explicit. By an ordinance passed June 6, 1879, and which was numbered 9, it was provided that all persons were prohibited from interfering with the free flow of the Los Angeles river, and in any way diverting it without permission of said Council, and a provision was contained in said ordinance providing for the punishment of its violation as a misdemeanor.

Tr. Fol. 212, Par. 26, page 130.

Another of the like character was passed on June 12, 1879.

Tr. fol. 213.

Yet it was also stipulated that the Los Angeles City Water Company has ever since its incorporation taken more than ten inches of water, measured under a four inch pressure, from the Los Angeles river, and has kept increasing the amount as the population increased until it amounts to 1000 or 1500 inches, measured under a four inch pressure, which, however, includes 650 to 690 inches by the underground excavations referred to. This leaves practically from 600 to 800 or 900 inches taken from the river at the present time, and no objection ever has been made to it by the city of Los Angeles until in 1896, and in the manner hereinafter referred to, so that it will be observed that these ordinances which prohibited the diversion from the Los Angeles river, passed as early as 1879, were not intended to apply and did not apply to the Los Angeles City Water Company, which continued to divert the water without any objection of any kind. For the stipulation in regard to taking the water, see

Tr. fols. 198-199.

On the 9th of August, 1887, seven years after the new constitution went into effect, the mayor and council passed a resolution by which it was resolved that there existed a necessity for the erection of one hydrant, for protection against fire, at 11 different points in the city, which were specified in the ordinance, and the second section was as follows:

"Sec. 2. That the Los Angeles City Water "Company, a corporation, as the successor and "assignee of John S. Griffin, Prudent Beaudry

"and Solomon Lazard, are hereby ordered to erect "or cause to be erected one fire hydrant for pro- "tection against fire at one corner of each of the "cross streets hereinafter named, that is to say, "at one corner of the intersection of corners "specified in Section 1 of this resolution, as pro- "vided by the agreement approved July 22, "1868."

See par. 28 of the agreed statement, Tr. fol. 213.

On February 17, 1896, the fire commissioners of the city made a report to the council calling the attention of the council to the fact that the City Water Company was then putting in water mains on South Hope and South Flower, and the committee requested that the council should order fire hydrants placed at the intersection of said streets with Ninth, Twelfth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth and Washington. The report was adopted. On the same day, Mr. Pessel, one of the councilmen, moved that the Los Angeles City Water Company be directed to lay a four inch main on Santee street between Ninth and Twenty-third streets, where there was not already a four inch pipe laid, and place fire hydrants at every other intersection on said Santee street, which motion was adopted.

Mr. Kingery also moved that the city clerk notify the water company to repair the fire hydrant at the corner of Pico and Pearl streets.

Tr. par. 30 Agreed Statement, fols. 214-215.

On the 23rd of February, 1897, the very day on which the ordinance attacked in this suit

was adopted, the fire and water committee reported, recommending that petition No. 139, from R. Zelner, et al, asking that a fire hydrant be placed on the corner of Oak and Washington streets, be granted, and the Los Angeles City Water Company instructed to erect said hydrant. This report was adopted. Then immediately afterwards, follows this ordinance fixing the rates at less than the contract price.

See par. 31, Agreed Statement, fols. 215-216.

At the same session there was another order to lay a four inch main on Hill street from Ninth to Lincoln, and place a fire hydrant at the corner of Moore and Lincoln street.

Id. fol. 260.

Now, these are merely samples. It is agreed that ever since the execution of the said instrument and the assignment to the Los Angeles City Water Company, that that company has been furnishing water to the city of Los Angeles for the public schools, city hospitals and jails therein, free of charge. It is agreed that they have done everything which that contract called for, except as modified by the subsequent agreement; that the company had acquired the system known as the Beaudry system and certain water rights in the Arroyo Seco, and the stock of the corporation known as the East Side Spring Water Company.

See Tr. fols. 194-196, par. 78 and 79 of the Agreed Statement. That ever since execution of the said instrument, bearing date the 20th of July, 1868, the Los Angeles City Water Company has made the said improvements and ex-

tensions and maintained the same at its own expense.

Par. 13, fol. 199, page 121.

It was agreed that the Los Angeles City Water Company began laying the 12 miles of iron pipe and the erection of the fire hydrants at one corner of each cross street, immediately after its incorporation, and it was continued by the said company until, at the time that this agreed statement was made, it had erected over 500 fire hydrants.

Tr. fols. 192-193, par. 4 and 5; that it erected the ornamental fountain and had constructed reservoirs used in connection with the water system, until there are now six; one of a capacity of 40,000,000 gallons; another of 15,000,000 gallons; another of 3,500,000 gallons; another of 6,000,000 gallons; one of 340,000 gallons, and one of 500,000 gallons. That they selected the place of diversion of the waters within 60 days after the making of the contract.

Par. 6, fols. 193-4.

The modification of the contract is agreed on and set forth at page 118.

The Los Angeles City Water Company took possession of the water works mentioned in the statement, and pursuant to the agreement, began to lay the pipes in said city, to furnish the inhabitants with water, as in the said instrument, provided, and to lay down the 12 miles of iron pipe in the city, for that purpose, and have ever since been extending the pipe system until there are now about 320 miles of pipe laid within

the city and used in the distribution of water for supplying the inhabitants of the city with water for domestic use, under said instrument.

Tr. fol. 192, page 117, par. 4 of agreed statement.

From these legislative acts, if there had been any lack of legislative authority in the city council to make such a contract in the first instance, this contract has been ratified by the legislature of the state; and even if that proposition were at all uncertain, the ordinances of the city, the conduct of both parties with respect to the performance of the contract, extending over almost the entire period of thirty years, it could not be now questioned by the city.

But this entire subject, the original power of the city to enter into such a contract, and the effect of the act of April 2, 1870, ratifying that act, is so fully treated of in the opinion of the learned judge of the Circuit Court, that we need only cite that opinion, and the authorities upon which it is based.

Tr. pages 88-104.

The court here added:

"These views render unnecessary the deter-"mination of the question of estoppel, reached by "the complainants in their last brief." But it is submitted that these various acts of the legislature and the acceptance of the charters by the city of Los Angeles that were thus framed, and by the various ordinances of the city, and the entire conduct of both parties, the city is estopped from challenging the authority of this contract at this late day.

In support of this proposition, we need only cite the case of the Illinois Trust and Savings Bank v. the City of Arkansas City,

76 Fed. 271, 293.

At page 293, the court said:

"There is another and conclusive reason why "the city cannot maintain any of the defenses it "has interposed in this suit. It is that it can- "not accept the benefits and repudiate the bur- "dens of its contract. It is that it cannot be "heard to deny the truth of the representations, "of the existence and of the execution of this "contract, which its records and its conduct "have constantly made, and in reliance upon "which, the gas company and the water com- "pany constructed and extended the waterworks, "and the bank and the bondholders loaned their "money. No principle is more universal in the "jurisprudence of civilized nations, no principal "is more equitable in itself, or more salutary in "its effects, than that no one may, to the dam- "age of another, deny the truth of statements "and representations by which he has purposely "or carelessly induced that other to change his "situation. This principle is equitable, because "it forbids the untruthful or culpably negligent "deceiver from profiting by his own wrong, at "the expense of the innocent purchaser or con- "tractor who believed him. It is salutary, be- "cause it represses falsehood and fraud."

Then follows a citation of authorities, and the court continues:

"This principle is as applicable to the transac- "tions of corporations as to those of individuals."

"As Mr. Justice Campbell well said in Zabriskie "v. Railroad Co., 24 How, 381, 400, 401, in "which the Supreme Court held that a corpora- "tion was estopped to question the validity of its "void guaranty, because it had permitted the "circulation of the bonds that carried it:

"A corporation quite as much as an individ- "ual, is held to a careful adherence to truth in "all their dealings with mankind, and cannot, "by their representations or silence, involve "others in onerous engagements, and then de- "feat the calculations and claims their own "conduct had superinduced."

Here follows the citation of many other authorities, and the Court further said:

"In a business transaction like that of per- "fecting the construction of water works and "the use of water for itself and its inhabitants, "a municipality is subject to this principle to "the same extent as a private corporation. The "same rule governs its business transactions "that governs the negotiations of private indi- "viduals and corporations."

This is followed by the citation of numerous cases.

76 Fed., 293-294.

There is not a single one of the defenses interposed in that case that might not have been set up with as good conscience as anything that is asserted here.

IV.

Passing now to the judicial consideration of this contract, its validity has been recognized by the Supreme Court of the state of California

as frequently as it has been acknowledged or recognized by the legislature.

It was before the Supreme Court of this state in

City of Los Angeles v. Los Angeles City Water Co., 49 Cal., 638.

The question there was whether the water company held an interest in the property under that contract, that was subject to taxation. The court held that it did.

(The name of the company is given in that case as the "City Waterworks Company," but that is a mistake.)

That case arose and was decided in 1875. It was again before the Supreme Court in

City of L. A. v. Los Angeles City Water Co. 61 Cal. 95.

In that case the question was whether the city of Los Angeles could impose upon the Los Angeles City Water Co. a license tax for doing business in the city in supplying the inhabitants with water. It had passed an ordinance for that purpose, and the Supreme Court held that the ordinance was void, that it was in violation of the contract.

It was again before the Supreme Court in

L. A. City Water Co. v. L. A. City, 55 Cal. 176.

The question there was as to whether the company was entitled to receive pay for water furnished for sprinkling streets. The learned judge, in delivering the opinion of the court, said:

"As I interpret the contract, the plaintiff was "only entitled to receive pay for water furnished "to the inhabitants of Los Angeles for domestic "purposes. Water taken for sprinkling the "streets was for the purpose of irrigation and "was not included within the lease of the city to "the company."

It has been before the Supreme Court of California but recently. The thirty years mentioned in this contract expired on the 22nd day of July, 1898. Prior to that time the city had announced its determination to take possession of the works and water system constructed by the Los Angeles City Water Company, claiming that this contract was merely a lease, that the time would expire on the 22d day of July, 1898, and that the city as a reversioner would be entitled to the possession, although it had neither paid the value of the property nor taken any steps to ascertain its value, or to provide the means of payment. The Los Angeles City Water Co. brought a suit to enjoin the city from executing this threat. As the city's intention was also to take a part of the Crystal Springs Land & Water Company's property, or the whole of it, that company also brought a suit to restrain the city from doing anything of the kind. About the same time, or a little after these suits were brought, the city brought a suit against the water companies, the object of which was in part to restrain the defendants from preventing the city from taking possession of the property, or preventing the city from collecting the rates, and also for the appointment of a receiver of the

property. These cases came up before the court on application of the various parties for preliminary injunctions, and for the appointment of a receiver, and they were all heard together, and on the 10th of September, 1898, the judge who presided in the Superior Court of Los Angeles county, made an order issuing a preliminary injunction at the suit of the Crystal Springs Land and Water Company and of the Los Angeles City Water Company, against the city, restraining it from taking possession of the property. It also refused an injunction in the suit brought by the city of Los Angeles, restraining the defendants from preventing the city from taking such possession, but it granted an injunction restraining the Los Angeles City Water Company from collecting the rates, and it also restrained the city from collecting the rates, but appointed a receiver, not of the whole property, but for the collection of these rates. All parties appealed to the Supreme Court of the state of California from these various orders. They were all heard together in the Supreme Court. On the 5th day of May, 1899, they were decided by the Supreme Court.

See City of Los Angeles v. L. A. City Water Co., et al., and all the other cases, 57 Pac. 210.

Every line and letter of this opinion assumes the validity of this contract. The court held that the city was not entitled to take possession of the property nor to collect the rates; and concerning the character of the contract, the court said:

"The city undertakes to contend that the "contract is a lease, a lease pure and simple; "and as the contract, according to the city's "contention, must be thrown into the category "of a lease, it contends for one of the well- "known features of a lease of land, to wit: that "at the expiration of the term, the lessor has "an immediate right of re-entry and possession. "This position is not tenable. The written in- "strument in question cannot be categoried into "any smaller class than that of a contract. It "is a contract with many and various coven- "ants. It was not called a lease, however sug- "gestive that might have been, by the parties "who made it."

57 Pac. 214.

Again, on page 215, "the contract in question "does not only require the lessor at the termin- "ation of the lease to pay the lessee the value "of the improvements, but it in effect entitles "the lessee to retain the ownership and posses- "sion until the lessor shall pay it therefor."

And the case of the

National Waterworks Co. v. Kansas City, 62 Fed. 853,

the opinion by Judge Brewer was cited as more nearly approaching this case than any to which attention was called, and it was approved by this court. A petition for rehearing was filed in this cause, and the rehearing was denied, but this opinion was in some respects modified.

See 57 Pac., 571,

but it is not modified in any respect that in any way assumes that the contract itself was

not valid. The conclusion of the opinion was that the orders appealed from in cases 657 and 658 were affirmed. Those were suits in one of which, the Crystal Springs Land & Water Company was plaintiff, and in the other the Los Angeles City Water Company. In No. 655, the appeal by the Los Angeles City Water Company and the other defendants, from the order appointing a receiver in the suit of the city, and enjoining the water company from collecting the rates, was reversed, and the order in the same case refusing to restrain the company from preventing the city from taking possession and management and control of the property, was affirmed.

57 Pac. 216.

All this could not have been decided—in fact, none of it could be decided upon any other theory than that the contract was perfectly valid.

We pass now to the objections made to this contract by the defendant.

V.

(a.) It is first claimed that there was no power originally in the city to enter into the contract. That we have already considered. It is next claimed that the legislature could not ratify it. This contention is based upon the following propositions:

The constitution of the state of California, adopted in 1849, and which continued to be the constitution of this state until the adoption of the new constitution in 1879, declared; corporations may be formed under general laws, but

shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

Constitution of '49, art. IV, sec. 31.

In S. F. v. Spring Valley Water works, 48 Cal. 493, the Supreme Court of California held that the legislature could not confer upon such corporations—that is private corporations—any powers or grant them any privileges by a special act, and that an act of the legislature which granted to individuals and their assigns certain powers and privileges, and then provided that the act should not take effect unless the persons to whom the grant was made should within a certain time, organize themselves into a corporation, under existing laws, is a grant, not to the individuals as persons, but to the corporation when formed, and that such an act was therefore void.

Now the claim here is that this act of the legislature of California, April 2, 1870, ratifying the contract between the city and Griffin, Beaudry and Lazard, passed as it was after the company was incorporated, and after the assignment to it, comes within the principle of San Francisco v. Spring Valley Water Works; but the contrary has been decided by Judge Welborn, in the case,

See Tr. p. 97, *et seq*,

by Judge Ross in

Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 348,

and by the Supreme Court of California in

People v. Stanford, et al, 77 Cal. 371.

A claim was made in the court below that the grants of those franchises were taken by Griffin, Beaudry and Lazard merely as an evasion of the constitutional provision above referred to; but this proposition is absurd. In the case of

Telegraph Co. v. Alta Telegraph Co., 22 Cal. 398,

this question was decided exactly to the contrary of the ruling in San Francisco v. Spring Valley Waterworks. That case was decided before the contract between the city and Griffin and others, and that of San Francisco v. the Spring Valley Waterworks was not decided until July, 1874, about six years after the contract, and more than four years after the ratifying act. No question of this character ever occurred to anybody until long after the contract was made and ratified.

(*b*) It is also claimed in the court below that the Los Angeles City Water Company has been violating its contract by taking more than ten inches of water, measured under a four-inch, pressure, and for that reason is not entitled to enforce the contract; and furthermore that in the use of that water, as it is claimed not to be a use under the contract, the council had the power to regulate the rates for its use. But this claim has less foundation, if possible, than the other. The contract says nothing about water measured under a four-inch pressure; neither is there a limitation to ten inches under any measure. The language of the contract is, after granting the right to take water from the Los

Angeles river at a point above or near the present dam, as follows:

"Provided always that the said parties of the "second part, their heirs, executors, administra- "tors or assigns, shall at no time take from said "river, for the use of said water works, *more than "ten inches of water without the previous consent "of the mayor and common council of said city.*"

But it has been decided by the Supreme Court of California that that does not necessarily mean any quantity less than the amount which the city water company has ever taken.

In Dougherty v. Haggin, 56 Cal. 522, the plaintiff alleged that he was the owner and entitled to the use of 400 inches of water measured under a four inch pressure. The jury found in his favor, to the extent of 40 inches of water, miner's measurement. It was admitted that miner's measurement was not any certain quantity, that the custom of miners varied; and the Supreme court, in this case, said, that notwithstanding the plaintiff might not have owned more than 40 inches of water miner's measurement he might have owned more than 400 inches measured under a four inch pressure. Furthermore the establishment of the four inch pressure as the statutory measurement was not until 1872. The legislature adopted the codes in 1872, and they went into effect on the first day of January, 1873, in the main. In the Civil Code under the title of "Water Rights," it was provided that a person desiring to appropriate water, must post a notice in writing in a conspicuous place at the point of intended diversion, stating therein:

1. That he claims the water there flowing to the extent of (giving the number) inches measured under a four inch pressure.

Civil Code, sec. 1415.

Now that is the first time at which this measurement had the sanction of law, and which, as already stated, was four years after this contract was made. Therefore, it had no influence upon the minds of these parties in forming their ideas of what was meant by ten inches of water. But the agreed statement shows that it did not mean a four inch pressure. One of the agreed facts is that to supply the domestic wants of the people of the city of Los Angeles requires an inch of water, measured under a four inch pressure, to every hundred inhabitants.

Tr. fol. 199, page 120.

Now the inhabitants of the city were at the time of this contract, about 5000 or 6000 in number.

Tr. fol. 9,

and the population has increased until it now amounts to about 103,000.

Fol. 199.

That at the time of the signing of the contract, the territorial limits of the city embraced four square leagues in a square form, the center of which was the center of the old pueblo plaza; that in 1872 the limits were extended 420 yards to the south, and within the past three years, and prior to July 1897, the limits were further extended so as to take in between ten and fifteen square miles of additional and adjacent territory; that the company began to ex-

tend its pipes over the said additions to the city as the same were settled up and improved, and ever since has been and now is furnishing water to the people of the said district added to the original territory of the city, and did, upon the demands of the city council, erect fire hydrants within the said additional territory, and furnished water free of charge, and is in all respects continuing to lay pipes, erect fire hydrants and furnish the inhabitants with water for domestic uses in like manner as it has conducted the same business within the original limits of the city, etc.

Tr. fol. 226, par. 41 agreed statement.

It will thus be seen that it would have required from 50 to 60 inches of water, measured under a four inch pressure, to have supplied the inhabitants of the city for domestic use alone, at the time the contract was made; and this does not take into consideration the amount necessary to supply the city with water for municipal purposes. Furthermore it will be seen, by reference to the contract, that the two principalc onsiderations, indeed the only considerations, which the city received for this contract were the $8000 damages waived, the $1500 per annum (subsequently reduced to $400), the construction of a system of water works which it should have the privilege of purchasing at the end of the time, the laying down in the streets of 12 miles of iron pipe sufficient to supply the inhabitants with water for domestic uses, and the city with water for municipal purposes.

Tr. fol. 183,

the erection of this ornamental fountain,

Id.

and the extension of this system as fast as the needs of the city required it

Fol. 186

for the purpose of furnishing an adequate supply of water to the inhabitants of the city, as it then was, and as it might increase during the life of the contract.

With respect to the amount of the water, the city reserved to itself, in the contract, the right to furnish water for irrigation; and the rights granted by the city to Griffin, Beaudry and Lazard were not to interfere with this right reserved to the city.

Tr. fol. 187, pages 113 and 114.

Now it is stipulated that the city has always had flowing in the Los Angeles river at the point from which the Los Angeles City Water Company has always diverted water from said river, a quantity sufficient to have supplied the Los Angeles City Water Company with all the water required to supply said city and its inhabitants with water for domestic purposes and municipal uses, and that the city has never objected, up to October 20, 1896, to the said Los Angeles City Water Company taking as much water from said river as it might require for said uses.

Tr. fol. 224, par. 38.

The objection which the city made in October, 1896, here referred to, was the passage of a resolution by the council which ran to the effect that from that date, including the 22nd of

July, 1898, or until the further order of the council, the Los Angeles City Water Company and all other persons or corporations taking the water thereinafter mentioned, for the purpose of distributing or selling the same to the city of Los Angeles, be required to pay to the city an amount of money equal to 40 per cent of the gross rate received from the consumers, for rental thereof, etc., and that if the company did not agree to pay said rental, then that a suit should be brought to enjoin them from taking any more than ten inches, measured under a four inch pressure.

Tr. Fols., 220-223.

The company continued to take the water after the time mentioned, the same as before. It was further agreed between the parties that in the extension of the said system and the obtaining of an increased quantity of water, whenever such increase was made, it was necessary to supply the inhabitants of the city of Los Angeles with water for domestic use and furnish the city with water for municipal purposes, and that the company has, in meeting the wants of the city, among other things, purchased the system that was established by P. Beaudry, known as the Beaudry System of Waterworks, also certain water rights in the Arroyo Seco, and conducted water from the Arroyo Seco into the city on the east side of the Los Angeles river, and has been furnishing the inhabitants of that portion of the city with water from said system, and also acquired the stock of the corporation known as the East

Side Spring Water Company, mentioned in paragraph X of the complaint.

Tr. Fol. 196.

Now all these things have been done, this enormous pipe system laid, reservoirs constructed, other systems, which either had failed or were on the point of failure, and which were supplying some portions of the city, purchased by the Los Angeles City Water Company, and connected with its own system, and the whole pipe system adjusted to the use of the water which had been diverted by means of this ditch, and to the extent of anywhere from 600 to 1000 inches, as the needs of the city required, in addition to the amount developed by the Crystal Springs Land and Water Company — all of which things were done with the full knowledge and acquiescence of the city, up to the period of less than two years before the thirty years expired. Expenditures running into the millions had been made in perfecting this system thus established, when the city council suddenly resolved, in October, 1896, that the company was to pay 40 per cent of the gross proceeds to it.

We have shown also that ten inches of water measured under a four inch pressure, was not in the minds of the parties at that time. We have shown that it was one of the contract obligations that the Los Angeles City Water Company was to supply the inhabitants with water and the city with water for municipal purposes. We maintain, therefore, that when these things have been done by one party with

the knowledge and acquiescence of the other; when it is admitted that over 500 fire hydrants have been erected, a large number of public buildings of various kinds constructed, consisting of school houses, jails and court houses, and the city have been supplied with this identical water through this system for all of its own purposes, not only in the original limits of the city, but throughout its extension since, we contend that this conduct amounts to an interpretation of the contract made by the parties themselves, and that where a contract is uncertain and indefinite—as this one certainly is, with reference to the amount of water to be taken, the courts will accept the interpretation that the conduct of the parties has put upon it.

Cent. Trust Co. v. Wabash R. R. Co., 34 Fed. 255-6.
McNeal v. Shirley, 33 Cal. 206.
Hill v. McKay, 94 Cal. 20.
Mulford v. LeFranc, 26 Cal. 108.
Pico v. Coleman, 47 Cal. 65.
Truett v. Adams, 66 Cal. 218.
Yocco v. Conroy, 104 Cal. 608.
Longbell Lumber Co. v. Stump, 86 Fed. 578.

and the city could not change this interpretation nor withdraw the consent thus constructively given, at least, after such an expenditure of money, and the construction of the works made with a view to the distribution of the water as provided in the contract. It was so held by the

learned judge in delivering the opinion in this case.

See Tr. pages 106-107,

and the cases there cited fully sustain that proposition. But in addition to that, in this same controversy between these parties, decided by the Supreme Court of California, 57 Pac, 210, the question was again raised, and that court held that looking at the context and the subject matter of the contract, it was quite evident that the parties did not mean only ten inches under a four inch pressure. If that had been the meaning, there would have been no sense in the other important covenants. At the time of the contract, it would have taken many times ten inches under a four inch pressure to furnish water for domestic purposes to the few thousand people who were then inhabitants of the city, and much more than that amount was necessary to supply free water under the contract; and a solemn covenant to supply a growing city with sufficient water for domestic and municipal purposes for 30 years, from a flow of 10 inches, under a four inch pressure, would have been absurd.

57 Pac. Rep. 213.

We quote this further passage from the opinion of Justice McFarland, upon this subject:

"There is no pretense that the city ever ob-
"jected to the use of this water by the water
"company until 1896, when an ordinance was
"passed by the city government undertaking to
"withdraw the city's consent to the taking of
"more than ten inches from the river It is dif-
"ficult to imagine how this ordinance was passed

"seriously, for if the water company had been "prevented from taking from the river at that "time more than ten inches of water under "a four-inch pressure, there certainly would have "been a water famine in the city, for the city "had no works of its own, and no means what-"ever for supplying water for either domestic or "municipal purposes. But the city, having al-"lowed the water company for nearly thirty "years to divert the quantity of water above "mentioned, and to expend vast sums of money "upon the faith of the continuance of the right "to take said water, could not withdraw its con-"sent within the period of the contract."

"This same contention was made by the city "in the case of

"Los Angeles City Water Co. v. City of Los "Angeles, (U. S. Circuit Court, S. D. Cal.) "88 Fed. 745,

"but the court held otherwise. In that case "Wellborn, the learned judge holding the court, "said:"

And here follows a quotation from Judge Wellborn's decision upon that matter, which is obviously fully approved by the Supreme Court of California.

VI.

It is next claimed in the assignment of errors that the city was entitled to fix the rates because one corporation, the East Side Spring Water Company, was doing business here, and with respect to it the city did have the right to fix those rates. The city may have the right to fix any rates for any company not under any contract

relation with it, but the East Side Spring Water Company is shown by the stipulation, as already stated, to have been practically owned and absolutely controlled by the Los Angeles City Water Company. In truth, this system was a part of the Los Angeles City Water Company's system.

VII.

It is claimed that the city had the right to fix the rates because of the extension of the limits of the city beyond those in existence at the time of the contract. This also is already answered. Both parties interpreted the contract differently. The company was required to extend its pipes and did extend them into the annexed territory. It was required by the city itself to erect fire hydrants, and it did erect them in the same territory. Now the city had no authority to direct the Los Angeles City Water Company to erect fire hydrants or to do anything, except by virtue of the contract. The very order to erect the hydrants was a recognition of the contract and its obligations, and the erection of them was the acknowledgement of that obligation by the company. Such has been the interpretation of the parties, and if the interpretation were more doubtful than it is, it could not now be overturned; but in truth, there was no doubt about it, ever. The contract required the extension of the pipes as fast as the needs of the inhabitants required it, and it was not limited to any particular territory, but it was the inhabitants of the city who were to be supplied.

VIII.

It is further claimed that the acceptance of rates less than those fixed by the contract, by the company, for several years, estops it from insisting upon its rights under the contract; but this is a mistake. It is true that in 1880 or 1881, the city began to demand statements under this act of the legislature, passed in 1881, to carry into effect the constitutional provisions, and the city began fixing the rates. These rates were, for a considerable time, but slight deviations from those provided for in the contract. The history of these councilmanic proceedings will be found in the transcript,

Fols. 227-238,

But from the very beginning, the Los Angeles City Water Company was protesting against it. These protests are also set forth in the transcript,

Fols. 238-245.

This company was all the time protesting that the city had no right to violate this contract by fixing the rates at less than the contract price. Furthermore, they called attention to the fact continually, that under that contract they were not required to make these statements; and certainly there was nothing in the nature of an acquiescence, except it be in the fact that they did collect the rates so fixed. But the reasons for that are obvious. They were compelled either to bring a suit to set aside the ordinance or, if they charged any more, take the chances on a forfeiture of millions of dollars of property to the city, which

the city had agreed to pay for. In further answer to this claim, we contend that a contract in writing cannot be altered in this state, at least, except by a contract in writing, or by an executed parol agreement; and the Supreme Court of California has held that the acceptance of monthly interest at the rate of 8 per cent per annum waives the right to collect more interest for the months for which it was so accepted, but it does not waive the right to demand one per cent per month in the future, that being the contract rate.

Thompson v. Gormer, 104 Cal. 168.

In this case the court said:

"Under the principle of this section" (referring to the section of the Civil Code to the effect that a contract in writing cannot be altered except by a contract in writing, etc.) "the plaintiff was entitled to recover interest "at one per cent per month for the time during "which she refused to accept and did not accept "interest at 8 per cent per annum. She did not "contract in writing to change the interest as "expressed by the written terms of the note, "and her acceptance of the 8 per cent was of "no higher dignity than an express oral agree-"ment; but it was an executed agreement only "as to the months for which she accepted in-"terest at 8 per cent. As to the future, it was "executory."

Id. 170.

And the Supreme Court cited the cases of:

Erenberg v. Peters, 66 Cal. 114;

Taylor v. Soldati, 68 Cal. 127;

Simmons v. Hamilton, 56 Cal. 493.

In this case we could hardly have been said to have been accepting at all, for the company was continually protesting against it.

Erenberg v. Peters, 66 Cal. 114, was an action to recover rent due on a written lease. It will be remembered that the city in this case claims that the present contract is a lease; but the oral agreement was there held not executed, and therefore that it did not change the written contract.

IX.

It is claimed that this contract was void because of the grant of what is claimed to be an exclusive franchise, and which is supposed to be in violation of the statute of May 2, 1852, hereinbefore referred to. To this we answer, it is doubtful whether the provision referred to can be called a grant of an exclusive franchise at all. It will be seen that the city of Los Angeles claimed large rights in the waters of the Los Angeles river. It claimed to have certain waterworks at that time. They consisted of wooden pipes laid in the streets, and some other works, all of which were to be replaced with a better system. It granted the right to take this water from the river, turned over such waterworks as it claimed to have, to be used by Griffin, Beaudry and Lazard, until the substituted works were constructed, and there was this clause:

"And the said party of the first part hereby

covenant and agree to make no other lease, sale, contract, grant or franchise, to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said city for domestic purposes, during the continuance of this contract, always without prejudice to any rights already granted.

Tr. fol. 6.

Now this may be very fairly construed as applying to the property which the city either owned, or claimed to own, and which was there granted. And certainly if the city is the owner of the waters of the Los Angeles river, it is not in the nature of a grant of a monopoly or exclusive privilege, to say, that having given to one party the right to take water to the extent necessary to supply the inhabitants of the city, or to any other extent for that matter, that it will not grant to any other person another right to take the water of the river; that is, it would not lease or license anybody else to take its own property, and engage in the same business. But if it be construed to be an exclusive privilege, still the inhibition came from a legislative act, and the legislature could repeal it; and having ratified this particular contract, it did repeal it, so far as this company was concerned, if the repealing act was valid.

It is here that the counsel for the city contend that this provision of the constitution of 1849 was violated, but as is shown by the learned judge of the court below, that statute was an act providing for the incorporation of water companies, and the third section declared that

the act should not give to any company the right to supply any city with water unless it shall be previously authorized by ordinance, or unless it be done in conformity with a contract entered into between the city and the company. Any contracts hereafter so made shall be valid and binding in law, but shall not take from the city the right to regulate the rates for water, nor shall any exclusive right be granted by contract or otherwise for a term exceeding twenty years. These provisions, therefore, were directed against contracts between a city and a company incorporated under its provisions, and it had been held by Judge Ross that that provision had no application to the parties to whom the grant in that case is made, for the reason that they were not incorporated under that or any other act.

Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 348-9.

We say Griffin, Beaudry and Lazard were not incorporated under any act, much less under this act of May 3, 1852.

See Judge Wellborn's opinion, Tr. pages 97-8.

It therefore follows that there was nothing in this act that limited the general powers of a city to enter into a contract with Griffin, Beaudry and Lazard, and hence, we say again that the contract was originally valid without any ratification. But the ratifying act does not come within the inhibition of the constitution of 1849 at all. As already stated, that provision prohibits the creation of corporations by

special act, except for municipal purposes; and until the adoption of the new constitution, there was never any limitation upon the power of the legislature to create municipal corporations by special act, and indeed, they were nearly all of them so created. Now the act of 1852 is not a limitation upon the powers of private corporations, but upon the power of the municipal corporation. The act did not confer the right upon a company to supply the city with water unless the city should previously authorize it by an ordinance, or it be done in conformity with the contract between the city and the company Those contracts were declared to be valid and binding in law; but the limitation was that it should not take from the city the right to regulate rates, nor should any exclusive right be granted (by the city of course) by contract or otherwise, for a term exceeding twenty years. This we say was a limitation upon the power of the municipal corporation to grant--not upon the power of the company to take by grant. Hence, if the company had been incorporated when the contract was made, the ratification act, though special legislation, did not come within the Spring Valley Waterworks case, for it simply enlarged the power, or made valid the exercise by the city of a power, which was previously forbidden to the city; and as the legislature could have created the municipal corporation by a special act, and by similar acts could have invested it with any power that it saw fit, the ratification act was valid.

Furthermore, if this were a grant of an exclusive franchise and if it were void beyond the period of twenty years, this does not make the whole contract void.

Ill. Trust & Savings Bank v. City of Arkansas City, 76 Fed. 279-284.

At the pages referred to is a general discussion of this question of whether the invalidity of one provision in a contract renders the whole contract void, and numerous authorities are cited. It is submitted that the principle which governs the question is that unless the void provision is such that it could not be supposed that the contract would ever have been entered into at all without it, the invalidity of one clause of a contract does not render the entire contract void, but we quote especially this passage from that opinion:

"Moreover the city is in no position in this "case to insist upon the invalidity of the ex- "clusive character of this grant, if that could "avoid its entire contract. The city is not en- "deavoring to construct water works or to lay "pipes in its streets in violation of its exclusive "grant to the gas company, nor is anyone at- "tempting to do so under its license or by its "permission. No one seeks to infringe this ex- "clusive grant. In practical effect, it stands "unchallenged, and may ever continue to do so "until it is challenged by the act or endeavor of "some one who seeks to infringe it. Its invalid- "ity or validity is a moot question on account of "which the courts ought not to and will not "avoid any part of the contract. No one who

"does not infringe or threaten to infringe the "exclusiveness of a grant in a contract made by "a municipality can, after the substantial per- "formance of the contract by the grantee, be "held to say that the contract or grant is void "on account of the exclusive character of the lat- "ter."

Id. 281 and authorities cited.

Every word of this applies to the present case; and so with respect to the contract in regard to the rates; even if it were void, it would not avoid the entire contract, though to be sure that question might be a more serious one in the present suit, since the very object of the city is to enforce that part of the contract.

X.

It was claimed by the counsel for the city, on the demurrer to the bill, that there was an improper joinder of parties defendant. Suits of this character are substantially against the municipality, especially under the new constitution of California, under which, when a forfeiture accrues for overcharging rates, it accrues to the city. It has therefore, in its municipal character, a direct interest in the question of whether we can or cannot charge above the contract. In practice, in this state, it does not appear to have been considered very material whether the legislative body alone was sued, or the city alone, or both. In the Spring Valley Waterworks v. City and County of San Francisco, *et al.*,

82 Cal. 286,

while the report of the case does not show who the other defendants were they were in fact the

Board of Supervisors of the city and county of San Francisco; and in the case of

Jacobs v. Board of Supervisors of the City and County of San Francisco, *et al.*, 100 Cal. 121,

the other party there was the city and county of San Francisco. In the Spring Valley Waterworks v. the City and County of San Francisco, 52 Cal. 111,

the suit was against the city alone; but it was an application for a writ of prohibition seeking to restrain legislation pending before the board of supervisors, the threatened ordinance being one commanding the mayor to cause connections to be made with the pipes and mains for the purpose of taking water for the city for municipal uses without paying therefor. In the case of

Spring Valley Waterworks v. Bartlett, Mayor, *et al.*, 16 Fed. 615,

Judge Sawyer, delivering the opinion, said:

"I suppose this bill might just as effectually have been filed against the city and county of San Francisco, without making the mayor and the supervisors individually parties at all, but the injunction would operate upon them as agents and servants of the corporation.

Id. 622-623,

Such has been the practice in this state. The mayor is not a proper party, for it has been decided that under the new constitution of this state, it is the board of supervisors or the town

council alone that is invested with the power of fixing those rates.

Jacobs v. Board of Supervisors, 100 Cal. 121.

XI.

It was claimed in the court below that this bill could not be sustained because there was an adequate remedy at law. The argument is that the ordinance, if it be void, is void on its face, and therefore under a well known principle of equity, a court of equity will not interfere. The case of Spring Valley Waterworks v. Bartlett, 16 Fed. 615, was mainly relied upon to sustain that proposition. The opinion of Judge Wellborn fully refutes the contention here made, and shows that the case does not fall within the rule laid down in the decision just referred to, because this ordinance was not void on its face. The ordinance, indeed, is apparently valid. It requires the production of the contract between the city and the Los Angeles City Water Company to show its invalidity as to this company. However, the case would not fall within the principle anyhow. In the agreed statement of facts in this case, it is shown that "there were probably 15,000 houses in the city of Los Angeles at the time this case was tried. The complaint shows the growth of the city from a village of from 5000 to 6000 inhabitants to a town of over 75,000 as stated in the bill, 103,000 in the agreed statement of facts. It has been decided in many cases that to exclude the jurisdiction, of the courts of equity, the remedy at law must be as complete and adequate

as the remedy in equity. It is evident that the right of the company to collect the contract rate could, independently of setting aside this ordinance, be enforced in only two ways: one by suit against each individual, which it is obvious would be no remedy at all, since the cost of it would be ten times the amount of the rates. The other would be by taking the matter in the company's own hands, and shutting off the water for the non payment of rates; but this is not the pursuit of a remedy in any court, either of law or equity. It is righting one's wrongs by one's own hands. That is not the sort of a remedy that should exclude the jurisdiction of a court of equity. One who undertakes to redress his own wrongs assumes all the perils that may result from a mistake, and especially in a case where, as here, if the company should prove to be mistaken as to the validity of this contract, and its rights under it in the face of these constitutional and legal enactments, the penalty is the forfeiture of its entire works to a municipality that would be only too eager to enforce that forfeiture. Furthermore, in the very case referred to of Spring Valley Waterworks v. Bartlett, Judge Sawyer manifestly came to the conclusion that he did, very reluctantly, and himself delivered a most forcible argument against that determination. Besides, by the very cases cited by Judge Sawyer, as well as by the argument, it is evident, that the precise ground upon which the decision was put was that if the 14th article of the constitution was void because in conflict with

the constitution of the United States, that anything done under it would necessarily be void. Now that suit was brought to enjoin the municipal authorities from passing an ordinance. It may be doubtful whether courts of equity would enjoin the exercise of legislative power at all, but certainly there would be far more reason for refusing to restrain the passage of an ordinance fixing rates, which is the exercise of legislative power, when the very claim was that the ordinance if passed would be void, than there would be if the ordinance were actually passed and attempted to be enforced, or the party placed in such a position that he must either yield obedience to the ordinance, or find his property forfeited. These same considerations too, fully explain the conduct of the Los Angeles City Water Company in submitting to the collection of rates fixed at less than the contract rates, for so long a time. When the first departures were made from the contract rates, the differences were not very great, but each year the rates grew less and less, and the nearer the end of the thirty years approached, the greater were the reductions made by the council. All this time they had no choice but to submit, bring a suit, or take the chances of the forfeiture of their property, if they collected more than those rates, from a single individual. Injunctions have been issued and ordinances vacated by the courts in just such cases, and in many instances.

Co. of Mobile v. Louisville & Nashville R. R. Co., 84 Ala. 115.

Same case, 5 AM, State Rep. 342.

Reagan v. Farmers Land & Water Co., 154 U. S. 362.

Pennoyer v. McConnaughy, 140 U. S., 1.

That was a suit against a board of land commissioners of the state of Oregon to restrain them from doing certain acts under an act of the legislature of Oregon, looking to the disposition of certain lands. The ground upon which the injunction was sought being that the lands had already been disposed of by the state of Oregon, and the plaintiffs were the owners of part of them. The jurisdiction of the Federal Court was sustained principally upon the ground that the statute was unconstitutional which undertook to dispose of lands a second time, and that in such a case equity would interfere by injunction.

XII.

Another objection made in the court below to any relief here was that the ordinance would, by its terms, expire in a year. That a decision could not be reached here in a year, and hence that the annullment of the ordinance would be ineffective. If this were any reason for refusing the relief, then it would follow that no one ever would be entitled to any remedy in any court against such action, whether it be in violation of a contract, or whether it simply fix the rates so low as virtually to deprive one of his property without due process of law. But courts do entertain bills of this character, and they have been sustained by the Supreme Court of California, notwithstanding that at the time

the decision was given the year had already expired.

San Diego Water Co. v. City of San Diego, 118 Cal. 556.

Judge Van Fleet, in stating the case, says: That in February, 1890, the common council of the city passed an ordinance fixing the water rates for the year beginning July 1st, 1890. In May, 1890, the plaintiff brought this action against the city, the common council, the mayor and the individual members of the council, to annul this ordinance, and enjoin its enforcement.

118 Cal. 562,

The case was decided in bank, October 9, 1897.

Id. 556.

Further along on page 562, Justice Van Fleet says:

"The action was tried after the expiration of "the year in question and a judgment was entered "declaring the ordinance to be void, and setting "the same aside. From this judgment and "from an order denying their motion for a new "trial, the defendants appealed."

Id. 562.

The Supreme Court having reached the conclusion that the court erred in the course of the trial of the cause, reversed the judgment denying a new trial, and remanded the cause for a new trial.

Id. 577.

Justice Garoutte concurred specially and con-

cluded that the judgment and order should be reversed and the cause remanded.

Id. 584.

Justice Temple concurred and agreed generally in the views expressed by Mr. Justice Garoutte.

Id. 584.

Justice Harrison also concurred.

Id. 586.

The only disenting opinion was that of Chief Justice Beatty, and he was of the opinion that the judgment and order should be affirmed.

Id. 588-9.

that is, the judgment setting aside the ordinance. Now this was seven years after the ordinance was passed, and more than six years after it had expired.

Besides Judge Wellborn's opinion here was delivered within a year, if that would make any difference; and if correct when it was given, it does not become error because the year has expired since.

XIII.

The evidence fully sustains the decision of the court below, that the parties did, subsequently to the making of the contract, mutually agree upon the rates charged in 1868, at the time the contract was made.

It is claimed in this case that there was no evidence introduced to support the claim that the city and the company had gotten together and agreed upon the rates that were charged in 1868, and made them the basis of the rates to be fixed under the contract. This matter has also

been specifically determined against the appellant by the Circuit Court.

See Tr. page 106.

Certainly this finding would not be disturbed except where there was no evidence to support it. We have already cited the paragraphs of the agreed statement of the facts wherein is set forth the proceedings of the council and the company in this matter.

See Tr. fols. 200-209, par. 15-18 of the agreed statement.

We will not extend this brief by considering these facts in detail, the substance of which is, that the city appointed two and the company two persons to fix the rates for water. This first consultation was in April, 1870. It is true that at that time the law provided that the rates should be fixed by just such a committee, but it could scarcely be denied that the same committee would be a very appropriate one to ascertain what the charges were which under the contract were to be fixed. Now that this is what they did do will appear from the following passages from the folios already cited:

"The undersigned commissioners duly "appointed on behalf of your honorable bodies, "to adjust, fix and establish the *rates and* "*charges of the Los Angeles City Water Company* "* * * respectfully report that they have "established water rates and charges for do- "mestic purposes, taking as a guide, as near as "can be, the charges and rates for domestic "purposes charged in July, 1868."

Fol. 201.

It will be seen that the ordinance was not fixing the rates for any other company than the Los Angeles City Water Company. These rates so fixed were established and confirmed in 1871.

Tr. fol. 205.

In August, 1874, the ordinance regulating the rates, declared in section 1, that:

"By virtue of the authority vested in and re-
"tained by the mayor and common council of
"the city of Los Angeles, by law. and by the
"provisions of the contract and agreement
"made and entered into between said municipal
"corporation, as party of the first part, and
"John S. Griffin, Prudent Beaudry and Solomon
"Lazard, and their assigns, of the second part,
"said contract dated the 20th of July, 1868,
"and approved July 22nd, 1868, it satisfactorily
"appearing that the above mentioned parties of
"the second part have duly assigned their
"rights and privileges under said contract to
"the Los Angeles City Water Company, the
"following schedule is adopted and established
"as the water rates to be charged by the said
"water company."

Tr. fol. 205-½.

It is submitted that it does appear from the evidence that they were having direct reference to this contract, and that their business was to ascertain as nearly as possible the rates which were charged at the date of the contract. It is further said by the counsel for the appellant that the ordinance attacked here fixes rates for many purposes other than those which were

contained within the contract, and hence that it had the right to fix the rates; but it is conceded in the stipulation that if the rates established in 1870, and which we say were the rates agreed by the parties to be the contract rates, were collected for the year beginning July 1st, 1897, and ending June 30, 1898, the company would receive $50,000 more than it will under this ordinance.

Tr. fol. 217, par. 33.

See also par. 444, II, fol. 216.

Now this, of course, has reference to the rates for those services which are provided by the contract.

Besides that, here again, the parties have put their construction upon the contract, and indeed the contract itself plainly includes within its domestic rates and domestic uses, all purposes other than irrigation. That is what the company was excluded from, and nothing else. But when the main service of the company—the main source from which nine-tenths of its revenues are received, is the domestic use, properly so-called; an ordinance which deprives them of $50,000 and more, which they ought to receive, under the contract, is void altogether.

XIV.

We finally bring before the court one further consideration bearing upon the questions involved in this case: When the new constitution was adopted the method of fixing the water rates remained the same that was provided by the statutes of 1858. The company chose two members of a commission, the legislative body of the

city two, they four the fifth, if necessary, and the rates were established by this commission. The constitution of 1879 declared that the rates for water furnished to the inhabitants of the city and to the city, should be fixed by the council or other governing body of the city. Under the previous acts corporations were required to furnish water for extinguishing fires and other municipal uses, free of charge. The new constitution and statutes passed in pursuance of it were both assailed as unconstitutional, upon the ground that this change in the mode fixing the rates was a law impairing the obligations of contracts; in other words, claiming that the mode of fixing the rates was a part of the contract, express or implied, for supplying municipalities with water. The Supreme Court of the state held that it was not a violation of contracts (having no special provision in the contract with reference to fixing the rates), that this commission for fixing water rates, whatever it might be called and however chosen, was the mere agency of the government and that the government could change its agents for that purpose at any time that it saw fit, and that there was no vested contract right for the continuance of this particular tribunal for fixing the rates.

Spring Valley Waterworks v. Board of Supervisors of San Francisco, 61 Cal. 3.

But as a result of this decision it was subsequently held that the provision of the act of April 22, 1858, for the incorporation of water companies requiring them to furnish water, free of charge, to cities and counties, cities or towns,

for certain purposes, was abrogated by the new constitution.

Art. XI, Sec. 19 and Art. XIV. Sec. 1.

and such companies are now relieved from any such obligation.

The provisions of Art. XIV we have already quoted. Sec.19 of Art. XI,is simply to the effect, that in any city where there are no public works owned and controlled by the municipality for supplying the same with water,or artificial light, any individual, or any company, duly incorporated for such purpose, under and by authority of the laws of this state, shall under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages, and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light or with fresh water for domestic and all other purposes, on condition that the municipal government shall have the right to regulate the charges therefor.

The decision here referred to is

Spring Valley Water Works v. Board of Supervisors of the city and county of San Francisco, 61 Cal. 18.

The various provisions of the new constitution were held to establish the universal rule that it was incumbent upon the governing legislative

body of the city to fix the rates to be charged for the use of the water for all purposes, and among other things, it was said in that case by Chief Justice Morrison:

"It seems to me that the decision in the above "case (the one already referred to, holding that "the rates were to be fixed as prescribed in the "constitution) has a bearing upon the case now "under consideration, for, if the constitution took "from the water company the privilege of hav-"ing a voice in fixing the rates, it might charge "for water supplied, it also relieved the company "of the duty of supplying water to the city for "any purpose free of charge. The consideration "for the duty imposed upon the company to sup-"ply free water, was the privilege conferred by "the same section, of the act, upon the company, "to participate in fixing the water rates. The "duty and privilege were correlative, and when "the privilege was taken away, the correspond-"ing duty ceased to exist."

Id. 27.

The Chief Justice added, however, that he was not obliged to rely upon that line of argument and that the plain language and obvious intention of the constitution forced him to the same conclusion.

Id.

We have already called attention to the stipulation,

Par. 7, page 118 of the transcript

that the said Los Angeles City Water Company has been, ever since the execution of said instrument and the assignment, furnishing water

to the city of Los Angeles for public schools, city hospitals and jails therein, free of charge, and also that it has performed its contract in regard to the erection of fire hydrants, and that during all of the time that the company has furnished the city of Los Angeles with water for the extinguishment of fires, free of charge.

Tr. fol. 193, par. 5.

It has been now nearly twenty years since the decisions of the Supreme Court of this state, that under the new constitution, there is no obligation upon water companies to furnish municipalities with water free of charge for any purpose; hence it has clearly been the understanding, both of the city of Los Angeles and of the Los Angeles City Water Company that the contract relation between them fixed a different rule for their government.

We offer an apology for the length of this brief, but as it was begun in advance of any brief on behalf of the appellant, so we have been compelled to close it without knowing exactly what we shall have to encounter, and as it has been anticipated by both parties that we should probably submit it upon briefs, we deemed it the part of prudence to notice all of the points that occurred to us might be made by our adversaries.

We respectfully submit that the decree should be affirmed.

JOHN GARBER and
WHITE & MONROE,
Solicitors for the Respondents.

J. S. CHAPMAN,
Of Counsel.

FILING BRIEF FOR APPELLEES

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

No. 148.

THE CITY OF LOS ANGELES, ET AL.,
APPELLANTS,

vs.

LOS ANGELES CITY WATER COMPANY, ET AL.,
APPELLEES.

S. M. WHITE, and
JOHN GARBER,
Attorneys for Appellees.

J. F. CHAPMAN,
Of Counsel.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED MARCH , 1908.

IN THE

SUPREME COURT

OF THE

UNITED STATES

Appeal from the Circuit Court of the United States for the Southern District of California.

The City of Los Angeles, et al.,
Appellants,

vs.

Los Angeles City Water Company, et al.,
Appellees.

REPLY BRIEF ON BEHALF OF THE APPELLEES.

In replying to such of the points made by the appellants as we deem it necessary to further consider, we call attention,

FIRST: On page 7 of the brief it is said that the city was, in addition to a certain water system, which it was supposed to have owned, also the owner of the paramount right to the use of the waters of the stream which flowed through the city, called the Los Angeles river, by virtue of the laws of Spain and Mexico which accorded

to the pueblos established by those governments the right to water courses which flowed through or along the land of such pueblos, and it is claimed that the right of the city as successor of the ancient Spanish and Mexican pueblo has been established in a series of suits beginning with

Elms v. Los Angeles, 58 Cal. 80,

and ending with the

City of Los Angeles v. Pomeroy, 124 Cal. 597.

To this we answer, first: That neither the title of the City of Los Angeles to the waters of the Los Angeles River nor the extent of its rights to use the same is at all involved in this suit, and is a matter of too great importance to be determined in a controversy where it is of no consequence. The Los Angeles City Water Company is not setting up any claim to any rights adverse to the City, but the whole foundation of this suit rests upon the contract made with the City, and all the rights of the Los Angeles City Water Company, whatever they may be, are derived from that contract. Besides nobody has ever doubted that the City of Los Angeles had an interest in the waters of the Los Angeles River, which interest is amply sufficient for all the purposes of this contract. The only controversy that there has ever been is as to the extent of those interests, the City having for years claimed to be the absolute owner of all the waters of the Los Angeles River, and of all the waters permeating the soil above the city. These rights, to the extent claimed by the city, have been repeatedly questioned, but they are

not involved here. But if any such question exists here or is necessary to the decision, it is respectfully submitted that it has not been established by a series of suits, beginning with Elms v Los Angeles, that the City of Los Angeles has any such rights as are determined in the case of the City of Los Angeles v. Pomeroy, 124 Cal. 597. There it was held that by virtue of its succession to some pueblo, whose very existence is exceedingly doubtful, it had certain paramount rights to the use of the waters of the river, and that these rights were of such an extravagant nature that it made no difference to what extent the boundaries of the City of Los Angeles might go under the laws of the State of California, those pueblo rights would expand with it, and cover every sort of a use to which water might be applied in any part of the territory which, under the acts of the Legislature of the State of California the boundaries of the City of Los Angeles might be extended.

Here let it be noted that the claim presented by the Mayor and Council of the City of Los Angeles to the Board of Land Commissioners for the settlement of private land claims in the State of California, was for sixteen square leagues. The decision was that the Mayor and Council of the City, which was then the corporate name of the municipal incorporation, had a good and valid claim for four square leagues, and it was approved to that extent and rejected for the balance. Since the patent issued for the four square leagues, the boundary has been extended in accordance with the laws of the State

of California until the City now includes nearly double the amount of land which was thus patented to it.

The question as to the rights of the City of Los Angeles do not depend upon the construction of any local statutes or rules, but assuming that the City of Los Angeles is the successor to any pueblo, the queston is, whether under the laws of Spain or Mexico, the pueblos had any such paramount rights to the use of the water at all, and whether as against other grantees of the Mexican government or persons holding title under the United States government of public lands which were situated along this Los Angeles River, these pueblo paramount rights, if they existed, expanded with the extension of the territorial limits of the city.

The decision of the Supreme Court of the State of California upon these questions does not establish a rule which this court is bound to follow, or which it will follow unless satisfied with the correctness of the decision; and it is respectfully submitted that no such rights attached to the pueblos under any Spanish or Mexican law, and that the City of Los Angeles, while as stated before, has its rights in the use of the waters of the Los Angeles River, there is no authority for any such rights as were in that case declared to exist.

SECOND. It is said that the contract also purported to cede to the lessees all the rights, easements, privileges and covenants described and contained in a certain instrument of lease made in 1865 by the city to one John L. Sansevaine,

but that the bill of complaint fails to set out this lease, so that we are ignorant of its terms so far as shown by the record. It does not very clearly appear whether anything is sought to be made out of this omission or not, but if so, it is submitted that the fact that it has not been made to appear is itself sufficient proof that it contained nothing that would in any manner tend to illustrate the proposition here.

The contract upon which this suit is brought is not a lease, but it is a complete contract fixing the rights of the parties under it, and nothing is necessary to the interpretation of it for any purpose involved here that is not in this record. The claim that this was a lease merely and that at the end of the thirty years the City of Los Angeles was entitled to the immediate possession of the property, was made in the case of Los Angeles v. Los Angeles City Water Company, 124 Cal. 368, 376, 379, 380, and concerning this proposition, the Supreme Court of California said:

"This position is not tenable. The written instrument in question cannot be categoried into any smaller class than that of a contract It is a contract with many and various covenants."

Id. 380

THIRD: On pages 11 and 12, we are informed that the Company had collected four million two hundred and twenty-eight thousand dollars up to October, 1896, and at the same rate would collect by the end of the thirty years, the further sum of seven hundred and fifty thousand dollars,

making an aggregate of about five millions, and that no assessments had been levied on the stockholders in excess of seventy-nine thousand, five hundred dollars.

Brief, pp, 11-12.

What bearing these figures have upon the questions in controversy here is not very apparent. The folios referred to in the brief are those where the annual statements of the Company are to be found. When the enterprise was first launched it was one of considerable financial hazard and for a long time its profits were practically nothing. But an unexpected occurrence of events some fourteen or fifteen years after the contract was entered into gave to the progress of the city such an impetus that its present population is over one hundred thousand. At the time the contract was made it was a village of about five thousand inhabitants. It will be seen from the United States census of 1880 that its population then was less than twelve thousand. But it was shortly after this that it began a career such as has hardly ever been equalled in the United States by any city, and the Water Company's business has become a profitable one. To the mind of the City this appears to be an amply sufficient reason why the contract should be wholly disregarded. It began cutting the rates about the time that this boom, as it is called here, began. Their attention was called to the provisions of this contract from the very commencement of the City's demands for these statements. [Tr. fol. 238-243.]

The first extension of the boundaries was in

1872, but that extended the limits only about four hundred and twenty yards south of the patent boundaries. But within about three years prior to July, 1897, the extensions had been such as to take in between ten and fifteen square miles of additional adjoining territory. [Tr. fol. 226.]

The fact that in the last few years the receipts from this property have been such as to make the investment a paying one does not in any manner affect the question of what is the meaning of this contract.

FOURTH: On page 13 of the brief, after stating the organization of the Crystal Springs Land and Water Company, the counsel for the City chose to inform us that the object of this new corporation was probably two-fold. First, to construct headworks in the name of a company not a party to nor successor in interest of the lessees of the contract of 1868, so that the City at the end of the term of the lease would not have any headworks with which to supply the distributing system. Secondly, to go through the form of taking the revenues out of one pocket and putting them in another, in the shape of a rental, so as to increase the apparent expenses of supplying water to the City, and thereby justifying higher rates. These probable two-fold objects are extracted entirely out of the imagination of the counsel for the city. Evidence of it, there is none. In the bill filed herein the history of this Crystal Springs property, and what it is, is set forth. [Tr. fols. 11-15.] A considerable portion of this history is represented in the stipulation. [Fols. 217, 223, 224.]

The property of the Crystal Springs Land and Water Company consisted at one time wholly of tracts of land located in the Ranchos San Rafael and Los Felis, none of which, except a four-acre tract, part of the Crystal Springs tract, so called, ever belonged to the Los Angeles City Water Company, and rights of way acquired from the owners of other tracts in said two ranchos, with the right to make excavations for the purpose of developing the waters, some of which rights of way have never been owned by the Los Angeles City Water Company. What necessity there was for any new corporation to be organized to avoid having such properties come within the contract of 1868, no one has ever been able to explain. How a tract of thirty-two acres of land in a Mexican grant, purchased in fee simple by the Crystal Springs Land and Water Company could have been "improvements made on or about a system of waterworks," even if it had been acquired by the Los Angeles City Water Company, it is impossible to discover.

Furthermore, why any sort of a performance should be gone through with to apparently increase expenses to justify higher rates, our adversaries do not appear ever to have been prepared to inform us. The Los Angeles City Water Company has always relied upon the contract. It has asked nothing except that the rates shall not be reduced below the rates mentioned in that contract. If they have this contract right, there was no need for any legerdemain to make things appear to be what they were

not at all. If they have not that right this bill cannot be maintained because it does not found itself upon any other claim than that under the contract.

FIFTH: It is next asserted that there is no evidence except the report of the committee to show what the rates in 1868 were. [Brief page 14.] This is a mistake which has already been sufficiently pointed out. There was the evidence that this committee was appointed for the purpose of determining it, and that when they made the report, it was acted upon by both parties, and accepted as correct.

SIXTH: It is next said that there is in the answer a denial that the City will attempt to enforce the forfeiture provided for by the constitution and laws of this State, in the event that the company should charge greater rates than those fixed by the ordinance. This occurs in paragraph XVII of the answer [Tr. fol. 115]; but it will be observed that this answer is signed by counsel and is verified by E. L. Blanchard on the part of the defendants, Silver, *et al*, including Blanchard, who constitute the City Council. On behalf of the defendant, the City of Los Angeles, the answer is signed by the City Attorney, and his associate counsel, and verified by W. E. Dunn, the City Attorney. Neither of the answers is really the answer of the City at all, and it would hardly be pretended that the answer of the attorneys for the City would preclude the City from insisting upon the forfeiture to itself, which the constitution defines, in view of the fact that in the same answer,

all of the defendants are insisting upon it that the contract which undertook to limit the power of the City in fixing the rates was unconstitutional and void.

And it is now, in this court, insisted that the contract is, at least in that respect, invalid. See assignments of error, [Tr. fol. 262–279] Brief, p. 16–22.

SEVENTH: The first point made by the counsel is that the contract does not purport to bind the State not to reduce rates, but applies only to the City in its corporate capacity. [Brief p. 22].

If there could be any question as to where the ultimate power of fixing rates resided at the time of the making of this contract, there is none now. The constitutional provision so often quoted in these cases, directly provides that the rates for supplying cities and their inhabitants with water shall be fixed annually by the Board of Supervisors, or City and County, or City, or Town Council, or other governing body of such City and County, or City or town, by ordinance, or otherwise, etc. [Constitution, Art. XIV, Sec. 1].

We confess that we do not exactly understand what the counsel here are contending for. It would seem that while the city might enter into such a contract with Griffin Beaudry and Lazard, and the Legislature might ratify it, and it might thus become a binding contract according to its very terms, yet there would be nothing in this that would prohibit the Legislature of the State of California from annihilating that provision at

any moment by a mere change in the agency by which the rates are to be fixed.

According to the argument, the next day after the Legislature had ratified this contract, it might have provided that the mayor alone or the city treasurer and auditor might regulate the rates which were to be charged by Griffin, Beaudry and Lazard or their assigns, and that such an act would not have affected the obligation of the contract.

Now the very point decided in the Spring Valley Waterworks v. the Board of Supervisors of San Francisco, 61 Cal. 3, was that the provisions in the act of 1858, by which the board for fixing the water rates was to consist of two members chosen by the City, two by the Water Company and the four to select a fifth, was simply the designation by the act of the Legislature of the agency by which these water rates were to be established; that this did not prevent the State from organizing municipal corporations in a different manner or providing other agencies to exercise this particular function, and that therefore the constitutional provision that the rates should be fixed by the council or other governing board did not divest the Water Company of any right vested in it. That by making such appointments or such agencies, the State did not incur any obligation to continue them, but it might change mode of appointing agents at any time, or it might discharge at any time those who have been appointed and appoint others, in any mode it saw fit. That the power of the State over its agents or officers is unlim-

ited, except by constitutional limitations [61 Cal. 7].

It was also held by the Supreme Court that when the constitution took away from the Water Company the privilege of having a voice in fixing the rates, it might charge for water supplied, it relieved the company of supplying water to the City for any purpose free of charge.

Spring Valley Waterworks v. Board of Supervisors, 61 Cal. 18, 27.

But now neither the State nor the City was under any contract obligation with the Spring Valley Waterworks in reference to the rates, and as there decided, the tribunal by which rates are to be established is not something which the State or the City is bound to continue, nor are we contending for any such thing here. We admit that Jacobs v. the Supervisors, 100 Cal. 121, determines that the mayor is not now a part of the tribunal for fixing the rates, that the new constitution expressly declares that it is to be done by the Board of Supervisors or City or Town Council or other governing body of such City or County, etc. We do not contend that it was not competent for the City of Los Angeles to be reorganized and its powers conferred upon whatsoever officers or tribunals the Legislature within the constitution, or the constitution itself, might see fit to prescribe; but what we say is that a mere change of the agency does not defeat the contract. The right of the City to regulate the charges for water existed, and in this particular contract, that right was reserved, but with a certain limitation; and while the agen-

cies by which that power might be exercised could be changed without interfering with the contract, such a change was not an enlargement of the power of the City. This provision was a substantial one, and the parties to this contract were undertaking the expenditure of large sums of money, the construction of a complete and adequate system of waterworks, the supplying of the City itself with water free of charge for a period of thirty years. It was paying an amply sufficient consideration for all that it was obtaining, and the insertion of this clause in this contract did not show that the parties supposed that its omission would have left the City without any right to fix the charges, but it showed that they understood that without such a provision the City's power over it would be practically unlimited. And it is a curious argument that draws from the reservation of the power, the conclusion that the parties supposed that if the reservation had not been inserted the power would not have existed at all. A reservation to the City of some power that it did not possess would certainly be a gross misuse of the word "reserve". But, besides, we are not left to mere conjecture upon this subject. Whether the corporation act of 1850, giving as it did, to cities of this state, full power to provide for supplying the people with water, was sufficient as a grant of the power to regulate the rates for the use of water might admit of some argument; but the legislature itself construed it too long ago to admit of there being any question about it now. The third section

of the act of May 3, 1852, providing for the incorporation of water companies, contains this clause:

"This act shall not give to any company a right to supply any city with water, unless it shall be previously authorized by an ordinance, or unless it be done in conformity with the contract entered into between the city and the company; any contracts hereafter so made shall be valid and binding in law, but *shall not take from the City the right to regulate the rates for water*, nor shall any exclusive right be granted by contract or otherwise for a term exceeding 20 years." Now, why provide that it should not take away the right, if no such right existed at all?

When in the contract here under consideration, it was provided: "*That the Mayor and Common Council of said City*" shall have and do reserve the right to regulate the water rates charged by said parties, etc., it is evident that the Mayor and Common Council of said City was used as the designation of the City itself, and it was a mode of expression that was quite common in the statutes of California, and with reference to this very city whose corporate name was at one time The Mayor and Common Council of the City of Los Angeles. Thus in the act of February, 1862, the title is: "An Act to authorize the Mayor and Common Council of the City of Los Angeles to borrow money for municipal improvements." The first section is "The Mayor and Common Council of the City of Los

Angeles are hereby authorized to borrow money for the purposes of municipal improvements either of irrigation or for furnishing water for domestic purposes to the amount and in the manner set forth." [Statutes of California, 1862, p. 10].

Now this act was amended at the same session by an act entitled: "An Act to amend an act approved February 19, 1862, entitled an act to authorize the Mayor and Common Council of the City of Los Angeles to borrow money for municipal improvements." The amendment consists of an amendment to Section 5, which was amended to read as follows:

"For the purpose of paying the interest on any debt or debts that may be contracted *by the aforesaid corporation*, under this act and to provide for the payment of the principal of the same when due, said corporation shall levy and collect a tax of thirty-five cents on every hundred dollars worth of taxable property, real and personal within the said City, five-sevenths of the fund derived from which said tax shall be set aside and applied exclusively to the payment of the interest, and the final redemption of the bonds or other evidences of indebtedness issued in pursuance of this act, and shall be known by the name of the interest and loan fund of 1862." [See Statutes of 1862, p. 262].

The fifth section of the original act did not differ in its mode of expression. It was there declared that for the purpose of paying the interest on any debt or debts that may be contracted by the aforesaid corporation under this

act, and to provide for the principal of the same, etc. [Statutes of 1862, p. 10].

Here it is obvious that the legislature was using the term "the mayor and Common Council of the City of Los Angeles," as being exactly the same as the corporation, and the loan which they were authorized to make, was the loan of the City itself.

A similar expression is found in the statute of 1861, where the mayor and Council of the City of Los Angeles were authorized to take and subscribe $50,000 to the capital stock of a railroad company in the County of Los Angeles, and to provide for the payment of the same, and other matters relating thereto; and it was there provided that when a petition from the board of directors of the railroad company, organized for the purpose of constructing a railroad by which a railroad connection should be formed between the City of Los Angeles, and the Bay of San Pedro * * * shall be presented to the mayor and council of the City of Los Angeles, petitioning the City to take and subscribe the sum of $50,000 to the caipital stock of such railroad company, "the said mayor and council shall, at the next regular meeting, or special meeting held for that purpose, vote upon the said request or proposition whether or not said stock shall be subscribed for; and if at such meeting a majority of said Common Council shall vote in favor of said proposition, then, in that event, the said mayor and Common Council shall in the name of said City of Los Angeles for the use, benefit and advantage of the said

City, take and subscribe the capital stock, and pledge the faith of the City of Los Angeles for the payment." [Statutes of 1861, page 457] And all through this act the body which is to act is the mayor and Common Council, or sometimes the Common Council alone is mentioned.

We insist upon it that the meaning is the same here—that the City did have the right to regulate the rates; that by this contract, limitation was put upon this power of the City, and that the limitation was ratified by the legislature of the State of California, and the mere change of agencies by which the general power to regulate is to be made, does not in any manner put an end to the limitation itself. The rule which is invoked to support this somewhat extraordinary contention, viz: that in public grants the construction is to be strongest against the grantee—has never yet, so far as we are advised, been carried to the extent of turning public grants or public contracts into mere cheats.

The case of

Logansport Gas Co. v. Piru, 89 Fed 85,

cited in the brief at page 24 is no authority for such a proposition. Besides it is directly contrary to the conclusion of the counsel that the City of Los Angeles did not have the power under the acts of the Legislature, as they then stood, to regulate the rates. In that case the City of Piru had adopted an ordinance in July, 1887, authorizing the laying and maintenance of pipes by corporations, companies and individuals, in the streets, etc., for the purpose of sup-

plying it and its inhabitants with natural gas for heating and illuminating purposes. The 11th section of this ordinance, so far as pertinent to the case, was set out in the opinion, and it provided in substance that any persons availing themselves of the rights under that ordinance should be understood to be acting with the condition that they should furnish natural gas to consumers for and at a price not to exceed 25 per cent above the schedule of prices following—which schedule was set forth. This ordinance was not accepted by any company or individual, and in November, 1887, they amended the ordinance by which the common council expressly reserved the right to fix the rate and price to be charged for gas after the expiration of ten years from the date of the passage of the ordinance, and every five years thereafter. [85 Fed. 186.]

Now it was held that when this ordinance, as amended, was accepted by the complainant's predecessor, it became binding on the complainant as though it had been expressly accepted by it: And said the court:

"The City at the time of the adoption of the ordinance possessed the undoubted power to fix the prices to be charged for natural gas, and no corporation or individual had or could acquire the right to pipe gas into the City for sale without accepting and agreeing to be bound by the prices so fixed."

This provision of the ordinance, when accepted, would for its validity rest on the contracting, and not on the legislative power of the Common Council. It seems apparent from the

terms of Sec. 11 of the ordinance and the amendment thereto that the Common Council was determined not wholly to contract away the right. By the amendment it waived the right to fix prices for the first ten years and reserved the right as fully as it originally existed, for the last ten years of the term. It is clear that the Common Council would not have granted the complainant an easement to use the streets of the city except upon condition that it should have the right to fix the prices of gas for the last ten years. By the acceptance of the ordinance a contract arose by which the complainant agreed that the Common Council in existence at the expiration of ten years should have the right to fix the prices to be charged for gas. When the Common Council exercised this reserved power by the adoption of the ordinance complained of, it was exercising a power reserved to it by express agreement of the complainant. It was not exercising a power of a mere legislative nature, but was exercising a power reserved to it by the express agreement of the complainant. The right so exercised by this agreement was not the right to ascertain the reasonable price of gas, and when so ascertained to fix it at that rate, but the right reserved was the right to fix its price to consumers." [*Id.* 186-187.]

The meaning of the decision is perfectly apparent. The City had the undoubted right to fix the price. It passes an ordinance, though, by which it practically agrees that it waives this right for the first ten years out of the twenty, but declares that after the ten years it

reserves the power to fix the rates. And when it was accepted, the Court said, it was a contract, a contract by which the City agreed not to fix rates for the first ten years, and by which, however, it was agreed that after that time it might fix them, and that no action in that respect could be complained of unless it amounted to a fraud.

The case here is of the same general nature. The right of the City of Los Angeles to fix the rates to be paid for water is undoubted. The powers given in the act of 1850 are amply sufficient to include it. It was construed by the legislature itself as giving it, and in this contract it is provided that that power is reserved, but subject to the limitation. And now we say that when accepted by the plaintiff and its predecessors, it became a contract, and the power was not the mere exercise of the legislative power, but the legislative power as modified by the contract.

We have no fault to find with the case of
Minturn v. Le Rue, 23 How 435, and
Fanning v. Gregoire, 16 How 524.

The first of these cases has little to do with any question involved here. The general proposition that grants by the legislature to corporations, whether public or private, are to be construed most strongly in favor of the grantor, that any ambiguity or doubt is to be resolved in favor of the public, is not denied by us.

The case of Fanning v. Gregoire proceeds, no doubt, upon the same general rule. But before leaving this case, we desire to call attention to

the very manifest distinction between Fanning v. Gregoire and the present case. The grant of the right there was to keep a ferry. It was granted to the plaintiff for twenty years by the legislature of Iowa, while Iowa was still a territory. By that act it was provided that no court or board of county commissioners should authorize any person to keep a ferry within the limits of the town of Dubuque. Subsequently the city of Dubuque was incorporated with power to license and establish ferries across the Mississippi river from the city, and under the power given, the city granted the defendant the right to keep the ferry. It was held that the first grant was not exclusive, and did not prevent the conferring of the power upon the city of Dubuque subsequently, when it had been incorporated. Now this right of keeping ferries, building bridges, constructing roads, is of a strictly public nature; but in the making of contracts for supplying cities and their inhabitants with water, the City is not in the exercise of its governmental power, but its proprietary or business powers.

"A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other proprietary, quasi private, conferred upon it not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class, it is governed by the rule here invoked. In their exercise it is ruling its

people and is bound to transmit its powers of government to its successive sets of officers unimpaired; but in the exercise of the powers of the latter class, it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants and it may exercise the business powers conferred upon it in the same way and in their exercise is to be governed by the same rules that govern a private individual or corporation. * * * In contracting for waterworks to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants but to obtain a private benefit for the city itself, and its denizens."

Ill. Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 282.

The stars here are authorities cited for this proposition. This distinction has been also stated in

Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, 10, 15–19.

From page 18 we quote the following:

"Cases are not infrequent where under a general power to cause the streets of a City to be lighted or to furnish its inhabitants with a supply of water without limitation as to time, it has been held that the City has no right to grant an exclusive franchise for a period of years; but these cases do not touch upon the question how far the city, in the exercise of an undoubted power to make a particular contract, can hedge it about with limitations designed to do little more

than bind the City to carry out the contract in good faith, and with decent regard for the rights of the other party."

Here follows the citation of a number of these cases, and among them Minturn v. Le Rue, 23 How. 435, and after the citation of the cases, the Court said:

"These cases furnish little or no support for the propositions for which they are cited."

And the case of Fanning v. Gregoire, 16 How., is another that may be included in the same list as having precious little, if any, bearing upon the question here.

In a recent case, the New York Court of Appeals had occasion to consider this question of how far rules for construing public grants applied to contracts which were for the mutual benefit of both parties, where the government does not hold itself out as conferring a bounty upon adventurers who are seeking its aid and support, but is inviting private capital to come to its aid, and they held, practically, that where the State is contracting like a private party on equal terms, those decisions and the doctrines which they announce have no application.

In the case of People v. Warren, 34 N. Y. Supplement, 942, the Court said:

"That the State surrenders its public and governmental functions and stands on an equal footing with an independent contractor with it as to such work as that in question here, and that as a State, it exercises no dominion over the property or control over the employment of laborers upon the work being done, is well

stated by Dillon in his work on Municipal Corporations, as follows:

"While the power to contract is a necessary constituent of the sovereignty of the State, when it enters into a contract with a private individual, it relinquishes its sovereign character by such transactions and as a general rule can claim no exemption from rules of law applicable to private parties under like circumstances."

This doctrine is fully applicable to this case. Here the history of these transactions is set forth. The City was in need of a system of waterworks adequate to the supply of the City and its inhabitants, and all previous attempts in that direction had proven a failure, and it contracted with the assignors of this appellee for the construction of such a system, its maintenance for the period of thirty years at its own expense, the extension of that system from time to time, as the needs of the City required, and in the meantime and during the whole term of thirty years, and as we say, until payment is made, to furnish the City with water for municipal purposes free of charge, and all this, the agreed statement of facts shows that the company has done, and there is no room for asserting that the only obligation which the City entered into with respect to this matter is to be gotten rid of on the doctrine that public grants are to be strictly construed. Besides that, there is not any doubt in this case, no matter by what name this contract may be called, nor what may be the character of the franchise. There is the plain agreement that while the City may regulate the rates, it will

not fix them at a less amount than was charged by the parties at the time the contract was made.

It is said, on page 31, that the admission of appellee's counsel that no exclusive franchise was attempted to be granted is an admission that the provision under consideration did not apply to the state. But unfortunately no such admission is made. Counsel do not refer to the spot where such an admission could be found, but we suppose it refers to the ninth subdivision of the brief, commencing on page 79, where after stating the claim that this contract was void because it was an exclusive franchise, we said: To this we answer, it is doubtful whether the provision referred to can be called a *grant* of an exclusive franchise at all, and in the course of the discussion we attempted to show that where there was any grant at all, exclusive or other, it was of things the City claimed to own, and that, as to the one thing which is the subject of this controversy, it is not a grant at all of any kind properly so-called, and coming within the rule referred to. The fact which we were there endeavoring to illustrate is the thought suggested by the various phases of the Westerly Waterworks cases.

These cases first appear in the 75th Federal Reporter, under the title of Westerly Waterworks v. Town of Westerly, *et al*, and Seamen's Friend Society *et al* v. Same, 75 Fed. 181.

There was an application for a preliminary injunction.

Id. 181.

The Court, after an extended statement of the facts, said:

"The only question here raised is whether the contract conferred on the Westerly Waterworks the exclusive right to use the highways for laying and maintaining water pipes."

Id. 187.

And the Court first reaches the conclusion that there was no authority for the grant of an exclusive right.

Id. 187–188.

And they said:

"The final question thus recurs whether the vote of the town of April 11, 1895, and the subsequent votes and proceedings, do impair the obligation of the contract made June 29, 1885. There can be no doubt that the effect of carrying out this vote will be greatly to depreciate the value of the waterworks and of the bonds issued by them, and that the town intends to proceed to construct its works, and to supply water to the inhabitants, regardless of these consequences. The Westerly Waterworks will remain under the obligations of the contract to supply water without charge for the town hall and for drinking fountains, to maintain a prescribed head of water, and, perhaps, to sell, their works to the town at an appraised value. It seems reasonably clear that, if there be a contract here, the value of the contract, at least, will be materially impaired. The respondents urge that to grant the relief here prayed for, and to enjoin the construction of the water works, would be in effect to give the complainants the benefit of an exclusive franchise, to

which benefit they are not entitled This statement, however, is not entirely correct.

If the complainants had an exclusive right, they could enjoin *any other waterworks*, even if they were unable to supply the persons to be accommodated by the proposed works, and even if there were no immediate ascertainable injury to themselves. This is the result, as it seems to me from all the cases on this question, provided, always, that the conduct of the owners of the franchise is not such as to forfeit their rights. On the other hand, to refuse relief here would be to permit the destruction of the whole contract. There must be some rights which are entitled to protection under the contract admitted, and found to be valid."

75 Fed. 188–189.

After considering this question and especially some of the authorities upon it, the court further said:

"Turning, then, to the substantive question which, as it seems to me, must be here decided, the question is whether the contract here in dispute contains an implicit reservation, founded on the then-existing state of the law, of a right of a town, at pleasure, to construct waterworks. The law gives power to construct waterworks, and also to contract for a water supply, and, as incidental to such contract, to confer certain rights and exemptions on the contractors. Does this leave it competent for the town to make a contract with this corporation, and afterwards without any default on the part of the corporation, and in derogation of the terms of the con-

tract, to construct other works? *The question is not whether the town may grant a franchise to be exclusively exercised by the company for a term of years, without regard to its ability or willingness to furnish an adequate supply of suitable water; but the question is, rather, whether the town has not, by its own act under one branch of the law, limited its power to act under the other branch of the act.* Answering this question in the affirmative, I find that the town is making the attempt to exceed the limits to set; and the finding of the Supreme Court of Rhode Island is ground for a conclusive finding here that such attempt is in terms authorized by the State law—that is to say, that the acts which I find to have this character are so authorized. The necessary conclusion on this point seems to me to be that this proceeding amounts to an act of the State impairing the obligation of a contract."

Citing Hamilton Gas-light & Coke Co. v. Hamilton City, 146 U. S. 258.

Now here it is explicitly determined that the City may be bound by a contract without necessarily granting an exclusive franchise. And the Court in this case issued a preliminary injunction. From this order an appeal was taken to the Circuit Court of Appeals and dismissed on the ground that that Court had no jurisdiction. See

Town of Westerly *et al.* v. Westerly Waterworks, 76 Fed. 467.

In dismissing the appeal the Court suggested that if the parties desired a rehearing on the

merits, they should move in the Circuit Court to dissolve the injunction.

Id. 468.

In pursuance of that suggestion, they did move. See

Westerly Waterworks v. Town of Westerly, *et al.*, etc., 77 Fed. 783.

When this motion was brought up at this place, it was objected that the decision of the Court in granting the preliminary injunctions put the matter at rest in that Court. This objection, however, was overruled and the case was set down for hearing before two judges. It was heard. See

Westerly Waterworks Co. v. Town of Westerly, 80 Fed. 611.

And when the cases came up on the motion to dissolve the temporary injunction, the Court said that as the merits had been exhaustively argued and all parties had requested a decision upon the main questions which determined their substantive rights, they proceeded to consider it. Now, in that case or at that time, the court came to the conclusion that the injunctions should be dissolved, and they were dissolved. They reached this conclusion upon a consideration of the laws of the State of Rhode Island and the peculiar political constitution of these towns, which were held to be a something different and distinct from the town council. The points, however, which we had in mind were the following: "All persons contracting with a municipal corporation must at their peril inquire into the power

of the corporation or of its officers to make the contract. * * * This rule is for the public protection, and there can be no case wherein it should be more strictly applied than one involving the granting of an exclusive franchise. * * * As it is assumed in the opinion of the learned district judge granting the temporary injunctions, that a valid contract exists, even if an exclusive right has not been granted; as this is assumed by counsel for the waterworks and for the Seamen's Friend Society; and as the origin and exact nature of that contract are somewhat obscure, after the concession that exclusive rights were not conferred upon the company, it becomes necessary to dwell upon this point. Our primary inquiry is rather as to what rights the company has than as to whether they arise from a 'contract', using the term in the sense of an agreement between competent parties, or from the so called 'contract' arising between the legislature and the company from the direct or indirect franchise."

They then proceed to inquire into the rights which accrued to the company and the obligations imposed upon the town, and, as we said before, came to the conclusion that the town had not disabled itself in that case to construct other works.

The page from which we have been quoting last is page 614.

On page 618 the Court say:

"But this argument leads to such a conclusion that we must reject it. The Company is bound, if bound at all, to supply water, not for 25 years, but to supply it 'at all times,' and this

would lead us to a perpetual contract, and a perpetual contract would not be within the class of contracts which upon any theory the town is authorized to make. It is only by retaining the word "exclusive" that we can find an intention of the town to preclude itself from competition; that is to say, upon the theory of the argument of the complainants, the town had no power to grant exclusive rights, and so far as unlawful such language must be rejected, but so far as lawful it may be retained. The contract for exclusive rights necessarily covers the exclusion of the town. The town had a right to contract, not to compete for a reasonable time, and an intention so to contract is a necessary implication, from the use of the word "exclusive." In other words, we must reject the word "exclusive" as a word of grant, and retain it as a word of contract, but limiting its application to the town, though it was used as applicable to the town and to all others. Then from the fact that the town, according to this construction, has agreed not to compete, we infer an agreement imposing upon it the obligation to buy the Company's works if it does compete."

The Court then say that they doubt that the claims of the complainants could be supported by a reasonable construction of the language, and then say:

"Without, however, deciding the proper construction to be placed on the contract when the exact limits of the legal powers of the town under chapter 285 are determined, and without finally deciding the question of power in the town to agree to preclude itself from competition, we will for our present purposes assume the existence of such power as a necessary basis for an examination of the question. Has the power in fact been exercised by the town itself?

Has the town adopted or ratified the action of the council by corporate action in town meeting or otherwise, or by acquiescence?"

Id. 618.

And then, as before stated, it is determined that the power had not in fact been exercised by the town, and that the town had not adopted or ratified the action of the council.

But no such conclusions can be reached here. If there were any limitations upon the power of the council to make this contract, they came from the legislative action, and the same power which placed those limitations there removed them when it ratified this contract. And there is no question here of the fact of its ratification. The act of ratification is of as high nature and emanates from the same authority as the limitations upon the power to create exclusive grants referred to by the counsel.

In

Walla Walla City v. Walla Walla Water Company, 172 U. S. 1,

a question of a very similar nature arose. In that case there was in the contract an expressed agreement on the part of the City not to construct works, and this Court said that that express agreement was little more than an agreement on the part of the City that it would perform the obligations of the contract on its part in good faith. It was alleged in the bill in that case that the proposed action of the City was in fraud of the plaintiff's rights under its contract with the City, and the protection guaranteed to it under the Constitution of the United States.

172 U. S. 7.

And it was there claimed on behalf of the City that its action in entering into this contract was not the exercise of its sovereignty, and that in that particular it was not acting as the agent of the State, but was merely exercising a power as agent of its citizens and representing solely their proprietary interest, and therefore that its ordinances in this respect were not laws of the State, and that neither the State, nor the City as its agent, could be charged either with the making or the impairing of an original contract.

Id. 7–8.

And in this case the Court held that the contract in question was limited to 25 years, and was not an attempt to grant an exclusive privilege.

Id. 14.

And that in their opinion an ordinance granting a right to a Water Company for twenty-five years to lay and maintain water pipes for the purpose of furnishing the inhabitants of a City with water, does not create a monopoly or prevent the granting of a similar franchise to another company. Particularly is this so when taken in connection with the further stipulation that the City shall not erect waterworks of its own.

Id. 14–15.

Again: "Nor do we think the contract objectionable in its stipulation that the City would not erect waterworks of its own during the life of the contract. There was no attempt made to create a monopoly by granting an exclusive right to this company, and the agreement that

the City would not erect waterworks of its own was accompanied, in section 8 of the contract, with a reservation of a right to take, condemn and pay for the waterworks of the company at any time during the existence of the contract. Taking sections 7 and 8 together, they amount simply to this: That if the City should desire to establish waterworks of its own, it would do so by condemning the property of the company and making such changes in its plant or such additions thereto as it might deem desirable for the better supply of its inhabitants; but that it would not enter into a direct competition with the company during the life of the contract. As such competition would be almost necessarily ruinous to the company, it was little more than an agreement that the City would carry out the contract in good faith."

172 U. S. 17–18

VIII.

The next proposition of counsel is that the City did not possess the power to bind the state not to to reduce water rates. [Brief, p. 31.]

Santa Ana Water Company v. the Town of San Buena Ventura, 56 Fed. 339, we have already cited. There the power under which the town acted was a power to secure the health, cleanliness and good order of the town; to provide for the extinguishment of fires, and to supply the town with fresh water. Under this the contract was made which conferred upon Arnaz and others the exclusive privilege of supplying the town for fifty years.

Id. 340–341.

And gave them the unrestrained right to es-

tablish such rates for the supply of water to private persons as they might deem expedient, provided that such rates be general.

Id. 341.

This contract was upheld by Judge Ross, the legislature having subsequently ratified it.

Id. 342.

But certainly to confer the power upon particular individuals or their assigns, to fix the rates themselves, if valid, when ratified by the state, does bind the City not to reduce water rates. And so we say here, whether the City had the power in the first instance or not, its act was ratified by the legislature. It was a power which the legislature could confer, and hence could ratify the act after it was done.

We are told that the lessees, which is the name that our adversaries most delight to give us, did not believe that the City had authority to execute the contract is pretty clearly shown by the fact that in 1870 they, or the Los Angeles City Water Company, obtained a special statute purporting to confirm the action of the City. To which we answer that there is nothing to show that either the City Water Company, or any of its assignors, obtained the passage of the ratifying act at all; and secondly, if they had done so, it is nothing at all uncommon to have many things done to remove any possible doubt that others may have, when one has no doubt himself.

On page 46 of the brief under this same point, counsel take occasion to say that the value of this property has been fixed at one million

one hundred eighty-three thousand dollars by arbitrators appointed under the contract.

Now, while we do not know what effect this can have upon the question of whether a judgment given long before that time was or was not correct, and there is nothing of this kind in the record, we respectfully beg leave to say that no such determination has been made. On the contrary, the Los Angeles City Water Company denies that there has been such a determination, and litigation is now pending between the parties upon that very question. But the conclusions which are drawn from the argument of the counsel are not warranted by the cases which have been decided. Even where it is held that cities have no power to grant exclusive franchises or monopolies to endure forever, they may contract for the construction of works, and in order to induce capital to enter upon such an enterprise, may give them a right for a limited time, reserving to themselves the power to purchase the plant at the end of that time, or some lesser time, according to the terms of the contract

And now that the thirty years has expired, as soon as the amount to be paid has been determined, the City may, if it chooses, purchase the works and put an end to the rights of the Los Angeles City Water Company. And the City cannot receive all the benefits of this contract for nearly the entire period of the thirty years and then claim that the contract is invalid in the particular now under discussion.

We say again that it is not very obvious that

any doctrine of the power to grant exclusive rights, or what is a sufficient exercise of that power when it exists, has anything at all to do with this case. We are at a loss to perceive what a provision in this contract declaring that the Mayor and Council reserve the power to fix the rates, but agree that they shall not be lower than the then existing rates, has to do with a grant of any kind. It certainly does not in terms purport to be a grant, but it is a reservation of a power with the limitation referred to, and hence whatever doubts or difficulties there may be in the distinction referred to in the cases which we have been considering between the word "exclusive" as a word of grant and the same word as a word of contract, there is none whatever with reference to this particular subject. It is wholly a matter of contract and the interpretation of the agreement between the parties, and the rule for construing public grants has nothing to do with it. The contract must be supposed to have been entered into by both parties in good faith, and without any mental reservations on the part of either party of an interpretation that was to entirely emasculate it of all meaning and of all honesty.

In the Santa Ana case, 56 Fed. 339, as we have already shown, there was the right given or granted to the contracting parties to fix the water rates, and of course it was properly construed, not to mean the power of extortion, nor of establishing unconscionably oppressive rates. But here the parties have agreed upon what was reasonable, and it never occurred to anybody to

imagine that they were not reasonable until within the last few years. One of the cases cited by counsel, that of Des Moines v. Des Moines W. W. Co., 95 Iowa. 348, is said to declare that the presumption is that rates established by council are reasonable. With much greater reason may it be urged that where the parties were deliberately entering into a solemn compact and have agreed that in the exercise of the power of regulation, they shall not be reduced below a certain point, that that point which has thus been fixed by the contract is not unreasonable. It is needless to go into an examination of the various authorities cited by our adversaries. There is not anything in any of them but that may be admitted without in any way affecting the questions here. The power of the City to contract may not extend to such contracts as are against public policy, as is said on page 82 of the brief. But where do we go to ascertain what public policy is? Certainly the legislature is exactly the authority to declare that public policy, and when a contract has been made by a municipality, ratified by the legislature, acted upon by the parties for thirty years, declared by all the tribunals before which it has come, both State and Federal, to be valid, it requires no little courage to assail it upon the ground that it is in contravention of public policy. Counsel conclude the point which we are here considering, on page 90, by declaring that the result will not affect the Company as it has gone on for the whole of the thirty years term and collected only

the rates which were fixed by the council, but neglects to add that for the first fourteen or fifteen years of that time, it fixed the rates which had been established, and agreed upon, as those which were collected in 1868; and that since that time it has been invading the rights of the Los Angeles City Water Company under the contract, against its protest, and growing worse every year until it became intolerable.

NINTH: The third point made in the brief is that the provision of the contract of 1868, restraining the City from granting any other franchise, invalidated the whole contract. We do not desire to make any further reply to this than has been made in the opening brief, and will simply repeat here what has already been said two or three times, that the Supreme Court of California, as well as the United States Circuit Court, has had this contract before it many different times and never in any instance has its validity been doubted by the courts.

TENTH: The next attack is upon the Act of 1870, purporting to ratify the contract of 1868, and which is said to be unconstitutional and void. [Brief, page 95.] This also has been fully answered in advance.

ELEVENTH: The fifth point is that the Company has no right to collect any rates except such as are prescribed by the constitution and statutes of the State. [Brief, page 102.] Where either the constitution or statute prescribes any rates, we are not told. Both do provide for the establishment of those rates by the City Council, and the point here made, and the earnestness

with which it is insisted upon, fully justify the assertion in the bill in this case, that if the Company attempts to collect any rate except that fixed by the Council it will certainly be met with an attempt to deprive it of its property. We say here that the case of the People v. Stanford, decided by the Supreme Court of this State, cited in the opening brief of the appellee, was an interpretation of the constitution of this state upon the subject of forming corporations, and it was held that those provisions of the constitution and the case of the Spring Valley Waterworks did not prevent the conferring of such powers upon private individuals, nor affect them when transferred to corporations. But, as already shown, that particular provision of the act of 1852 relied upon to affect this contract had no reference to powers conferred upon private corporations, but was a limitation upon the power of the municipal corporation, a corporation which not only could be created by special act, but in this very instance was.

TWELFTH: The point that this Company has waived its right to or is estopped from claiming equitable relief, as contained in the fourth point, page 111 of the brief, was sufficiently answered in advance. There never was a single instance from the time the City began these dealings with the Company in which it did not protest against it. Besides as these ordinances fixing rates, are passed every year, take effect in July, and by the very terms of the constitution, can only exist for a year, it is not very plain what is meant here by laches on the

part of the Company. With all the diligence that we can put to the pursuit of a remedy for these wrongs, we are unable to get around within the year. In fact the time for an appeal from the judgment is two years, and the difficulties of pursuing remedies, and making judgments effective when they are recovered, are such that parties may well be pardoned for refraining from suit when they know that the tribunal which has done them a wrong has the power, and that it is its duty, to correct it, in a year. Besides it is a curious argument that a municipal corporation by repeated flagrant violations of its solemn compacts, has acquired the right to persist in those wrongs notwithstanding that the contract itself continues in full force.

The reason which counsel have discovered for the Company's acquiescence, viz: that it was obtaining its whole water supply up to 1887 from the river, amounting to several hundred inches above the ten inches which the contract permitted the lessees to take, and the fear that the City would prevent that use, is one in which counsel could hardly have, themselves, found a great deal of satisfaction. It has been determined by the United States Circuit Court, and that determination approved by the Supreme Court of the State of California in Los Angeles v. Los Angeles City Water Company, 124 Cal. 368, 377, 379, that the ten inches of water does not mean any such thing as is contended for by the City. As to the assertion that the water claimed by the Crystal Springs Land and Water

Company are of the same character as the waters which were held to belong to the City, in the case of the City of Los Angeles v. Pomeroy, *et al*, 124 Cal. We answer that no such thing appears in the record here, nor does it appear to have been held in the case of the City of Los Angels v. Pomeroy, *et al*, that the City did own the waters. All that has ever been held by the California Court is that the City had the paramount right to the use of it, but it neither has the paramount right, nor any right, to the use of it for supplying the inhabitants of the city for domestic uses, while this contract is in existence; and the contract is in existence until the value of the works is paid by the City. See contract in the stipulation of facts. [Tr. fols. 185, 186. Particularly the concluding portion of the last folio.]

THIRTEENTH. The next attack is upon the finding that the water rates fixed by the ordinance in question were not shown to be lower than those presrcibed by the contract. This we have doubtless sufficiently answered, but we again call attention to the fact that in entering into this contract, the parties used many words and sentences susceptible of more than one interpretation Now with reference to this supplying the inhabitants of the City with water for domestic purposes [Tr. fol. 183] it is not always easy to determine what would and what would not come within the meaning of that term. The things contained in the schedule of rates, which counsel select apparently for the purpose of showing us that they are not domestic uses, are

for the most part unquestionably included strictly within that term. The use of the water in bakeries and boarding schools, bath tubs in barber shops, water for horses and for washing carriages, horse troughs, come fairly within the meaning of the term. Why is not water for a bath tub in a barber shop or the use of water in cooking in bakeries and the supplying of people with water to drink at boarding schools just as much domestic uses as if the bath tubs and the cooking stoves were used in private houses, and the teachers and pupils at the boarding schools were at home. Water for horses and washing carriages is all included strictly within the term "domestic purposes." Some of the matters enumerated on page 118 may very well be said not to come within the strict definition of that term. But now let us consider the entire contract upon this subject. The Company was to secure to the inhabitants of the City a constant supply of water for domestic purposes. They were to furnish the public schools with water free of charge and the city hospitals and jails, etc. [Tr. fols. 183, 186.] They were to have the right to sell and distribute water for domestic purposes and to receive the rents and profits thereof for their own use. They had the right to lay pipes in any and all of the streets. The waterworks then existing were delivered over to them, but as already stated, to be effectually removed and a new system constructed, of which they were to have the possession at least for the period of thirty years, and until they were paid therefor. Now, says

the contract, "provided always that the rights and privileges by these presents conceded to said parties of the second part do not embrace to any extent or have any reference to the water-works of said City, used for the distribution of water for the purposes of irrigation, or affect in any manner any rights of irrigation, either existing at the present or which may exist hereafter, except as to the ten inches of water as hereinbefore provided. And it is expressly stipulated and covenanted that said parties of the second part shall not dispose of any water for the purpose of irrigation, but shall only take from said river the water necessary for domestic purposes, as above specified."

Id. Fol. 187–188.

Now we are to remember that this contract was one entered into with the expectation that the City would expand and increase in population, and as a matter of fact, it has become a great City. The Court knows that in the very nature of the subject of this contract, viz: the furnishing a City and its inhabitants with water, it is impossible that there could be an irrigating ditch running by every door in the City of Los Angeles; yet the only works that the City reserved and the only rights of distribution of the water which it retained to itself were those which related to the purposes of irrigation. Was it not contemplated that the people would keep horses and cows, and other domestic animals? That they would have bath tubs, barber shops, hotels, machinery of various kinds running in the City, and that water would be needed for a

thousand uses not included within the term "irrigation," and far more closely allied to the use of water for domestic purposes, and uses which the City from mere irrigation ditches could not supply? And in view of the fact that no other provision is made in these contracts except for the two, viz: the City, and Griffin, Beaudry and Lazard, and their assigns, can it be doubted that when they were speaking of domestic purposes, they had in their minds all the uses which a civilized people, and under a municipal government would require, other than irrigation? If, therefore, we take the language employed, the terms inserted, and read them with reference to the subject matter of the contract, scarce any other interpretation could be placed upon the contract than that this term "domestic purposes" was intended to include everything except that which was *ex industria* retained out of it. But when to this is added the fact that from the beginning of the contract until this time, the Company and its predecessors have been supplying all of these uses, and that it never entered into the mind of anybody to question the propriety of this interpretation which the parties had put upon this contract, until this controversy began, it is submitted that this interpretation thus fixed by the conduct of these parties, has placed the meaning of the contract beyond controversy.

FOURTEENTH: The next proposition contended for is, that if the contract of 1868 is valid and the ordinance of 1897 reduces the income below that which it should receive, the ordinance is void on its face, as being in conflict with the

federal constitution, and is no cloud on the complainant's title. [Par. VII. of the brief, page 122] It would be difficult to conceive of a more forcible answer to all of these various "ifs" than the counsel themselves have furnished. We had just been treated to a dissertation intended to persuade us that the Company was collecting rates for a great many purposes for which water was not being employed when the contract was made, and which did not come within it. Does that fact appear upon the face of this ordinance? Does it appear upon the face of the ordinance that it reduces the income of the Company below that which it should receive? Why the whole argument of counsel for the appellant is that no such thing either appears upon the face of it nor anywhere else, and a forfeiture could accrue. And there it was not decided in the case brought by the City of Los Angeles against the Los Angeles City Water Company and reported in 124 Cal. 385, or anywhere else, that the City was the real owner of the distributing plant, subject to a lien or right of possession for the protection of the lien on the part of the Company. In that case the whole controversy arose out of the threat of the City to take possession of the property. A receiver had been appointed to take the rates. The appeal was taken from the order appointing the receiver, and the injunction, so far as the court below had granted one against the Los Angeles City Water Company. In the opinion, the rights of the parties were very clearly set forth; and as at first delivered, the case of the National Water-

works v. Kansas City, 62 Fed. 853, decided by Judge Brewer, was declared to approach more nearly to the case at bar than any to which their attention had been called. They quoted from the opinion of Judge Brewer, and heartily approved of it and said: "Our conclusion, therefore, is both upon principle and authority, that the City, at the expiration of the thirty years, had no right to the possession of the waterworks without payment or tender of payment of their value." 124 Cal. 382, 383.

In the opinion upon a petition for a re-hearing, they took occasion to say that the Water Company is substantially in the position of a mortgagee in possession, having a lien on the property involved, as security for the performance of the covenants of the City contained in the contract, and this is supposed to have overthrown everything that was declared in the original opinion. It not only does nothing of the kind, but interpreted by the rules which have been so often laid down for the construction of the language of the court, viz: "that what is said in the opinion is to be construed with reference to the points involved in the controversy," it is exactly in accordance with what had been before said. The mortgagee in possession is entitled to remain in possession and to collect the rents and profits until his debt is paid. The same thing is true of a vendor in possession, and other contractual relations may give rise to the same rights.

Scarce anything could be imagined more ab-

surd than to say that this contract is in fact a mortgage. All the property that the City is even claimed to have, was by the contract to be obliterated There was the construction, at its own expense, by the Los Angeles City Water Company, of an enormous system of waterworks, the construction of which has been going on for thirty years, on property which in large part belonged to itself in fee simple, and as to the remainder, did not belong to the City; constructed out of materials that had not even been mined out of the earth when the contract was made. If any such interpretation is to be placed upon such language as was used by the Supreme Court, above quoted, we reply to it simply that the construction is manifestly erroneous, and this court is not to be bound by any such interpretation if it cuts any figure in the case.

But in that opinion the Court did say, quoting the language of Judge Brewer: "That the Company was entitled to retain the possession of the property till it was paid for." If that be so, is it not equally its duty to perform the terms of that contract?

If the growth of the City requires still further extensions of the water system; in order to meet it, must not the Company extend its system? If new and enlarged pipes become necessary to supply sections of the City which the increased population may demand, is it not the duty of the Company to provide it? Retaining the system of works, is it not still bound to furnish the City with water for the various municipal purposes, free of charge? But if we are correct in

supposing that all of these duties still rest upon the Company, then it is submitted that the City cannot escape the obligations which rest upon it. The claim that the case in 124 Cal. 368 sustains the position which the Company's attorneys took in the case of the City of Los Angeles v. the Los Angeles City Water Company, 49 Cal. 638, is another of the despairing efforts of the City seeking to excuse its plain violation of the contract. The claim made by the Company's attorneys in that case was denied by the Supreme Court of California. The Company was there claiming that the property was not taxable in its hands. That Court said that it was, and that too, notwithstanding they decided that a debt, though secured by a mortgage, was not property within the meaning of the constitution, requiring all property to be taxed.

People of the State of California v. the Hibernia Savings and Loan Society, 51 Cal. 243.

FIFTEENTH: The eighth point, viz: that the Company was engaged in violating the contract of '68 by taking more water than it was entitled to, and was therefore not authorized to demand specific performance, is answered by the decisions of the Supreme Court of California that have already been referred to, as well as by the decision of Judge Wellborn in this case, and the sections of the code referred to concerning the appropriation of water could not have had any effect upon the minds of the parties in entering into this contract, since the code itself was not adopted for

four years after the contract had been entered into.

Counsel for the appellants have annexed to their brief as a sort of an appendix the opinion of Judge McKinley of the Superior Court—a *nisi prius* tribunal—delivered several years ago, in a suit brought to restrain other companies from constructing works in the City limits, and we are told in the brief that after these parties had been harrassed by litigation by the City Water Company, they finally abandoned and left the field.

It will be seen that in that case, the learned judge of the Superior Court was of the opinion that the exclusive part of the franchise, if it were such, was beyond the power of the City, but that decision was upon a demurrer to the complaint, and it is true that the litigation afterwards ceased and the parties never constructed the works.

But this contract, as we have several times stated, has been before different courts since that time, and its validity has never been denied by anyone. And in the recent case before the Supreme Court of the State of California, it is manifest that that Court considered the contract perfectly valid. It is true that that case no more than this, called for a determination as to whether the exclusive part of the contract was or was not valid, but it certainly was not considered as rendering the whole contract void.

In this case in which Judge McKinley's opinion was delivered the City of Los Angeles was not a party, and of course the judgment cannot op-

erate as *res judicata* in this case, nor indeed in any other, even upon the point decided by the learned Judge; but we say again, it is of no effect here. The question here is as to the power of the City of Los Angeles, acting under constitutional and statutory provisions, to establish rates in violation of the contract, and it is respectfully submitted that the decision of the Circuit Court in this case is correct, and that the judgment should be affirmed.

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J. S. CHAPMAN,
Of Counsel.

LOS ANGELES *v.* LOS ANGELES CITY WATER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 148. Submitted March 15, 1900. — Decided April 30, 1900.

July 22, 1868, Los Angeles City leased to Griffin and others for a named sum its water works for a term of 30 years and granted them the right to lay pipes in the street, and to take the water from the Los Angeles River at a point above the dam then existing, and to sell and distribute it to the inhabitants of the city, reserving the right to regulate the water rates, provided that they should not be reduced to less than those then charged

Statement of the Case.

by the lessees. The lessees agreed to pay a fixed rental, to erect hydrants and furnish water for public uses without charge, and at the expiration of the term to return the works to the city in good order and condition, reasonable wear and damage excepted. This contract was procured for the purpose of transferring it to a corporation to be formed, which was done. Subsequently the limits of the city were extended as stated by the court, and the expenses of the corporation were increased accordingly. The city subsequently established water rates below those named in the contract, and the company collected the new rates, without in any other way acquiescing in the change. This suit was brought by the company to enforce the original contract. *Held*,

(1) That the power to regulate rates was an existent power, not granted by the contract, but reserved from it with a single limitation, the limitation that it should not be exercised to reduce rates below what was then charged, and that undoubtedly there was a contractual element, but that it was not in granting the power of regulation, but in the limitation upon it.

(2) That the city of Los Angeles, by its solemn contract, and for various considerations therein stated, gave to the party under whom defendant claims, the privilege of introducing, distributing and selling water to the inhabitants of that city, on certain terms and conditions, which defendant has complied with, and it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to the exercise of the rights and privileges granted.

(3) By acquiescing in the regulations of rates ever since 1880 the company is not estopped from claiming equitable relief and is guilty of no laches.

THIS suit involves the constitutionality of an ordinance of the city of Los Angeles, adopted February 23, 1897, fixing the water rates to be charged and collected by the Los Angeles City Water Company for the year ending June 30, 1898.

It is claimed that the ordinance impairs the obligation of the contract made with the grantors of the company on the 20th of July, 1868.

The facts were stipulated, and are substantially as follows:

On the 22d of July, 1868, the city of Los Angeles entered into a contract with John S. Griffin, P. Beaudry and Solomon Lazard, whereby it leased its water works to the said persons and their assignees for a term of thirty years, with the right to lay pipes in the streets of the city, and to sell and distribute the water for domestic purposes to the inhabitants of the city;

also with the right to take water from the Los Angeles River at a point at or above the present dam, to be selected within sixty days of the date of the contract. It was provided that no more than ten inches of water should be taken from the river without the previous consent of the mayor and common council.

The city bound itself not to make any other lease, sale, contract, grant or franchise to any person, corporation or company for the sale or delivery of water to the inhabitants of the city for domestic purposes during the continuance of the contract.

And it was provided "that the mayor and common council of said city shall have, and do reserve the right to regulate the water rates charged by the said parties of the second part, or their assignees, provided that they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged by the parties of the second part for water; . . ."

The said persons agreed to pay the city a rental of fifteen hundred dollars for the water works; to lay down in the streets of the city twelve miles of iron pipes of sufficient capacity to supply the inhabitants with water for domestic purposes; to extend the pipes as fast as the citizens would agree to take sufficient water to pay ten per cent upon the cost of such extension; to erect one hydrant, as protection against fire, at one corner of each crossing of streets where pipes were or might be laid; to erect an ornamental fountain on the public plaza at a cost not exceeding $1000; to construct and erect, within two years, such reservoirs, machinery, ditches and flumes as would secure the inhabitants with a constant supply of water for domestic purposes; to furnish water free of charge for the public school houses, hospitals and jails; to keep in repair all of said improvements, at the cost and expense of the parties of the second part, for said term of thirty years, and to return said water works to said party of the first part at the expiration of said term, in good order and condition, reasonable wear and damage of the elements excepted, upon payment to said parties of the value of the aforesaid improvements, to be ascertained as provided for in the contract; to give a bond in the sum of twenty thousand dollars for the performance of said contract, and to pay all state and county taxes assessed upon the water works during the period of thirty years.

And as the Circuit Court found, 88 Fed. Rep. 720, 723:

"Griffin, Beaudry and Lazard applied for and procured said contract on behalf and for the benefit of themselves and other persons, with the intention of forming a corporation to carry out said contract, and afterwards, about the middle or latter part of August, 1868, themselves and said other persons being the incorporators, organized, under the laws of the State of California, the Los Angeles City Water Company, for the purpose of supplying the inhabitants of said city with water for domestic purposes, etc., under the terms of said contract; and assigned all their rights and franchises under said contract to said company by a written instrument dated June the 12th, 1869, and recorded in the office of the recorder of said county of Los Angeles, June the 15th, 1869.

"On April the 2d, 1870, the legislature of California passed an act hereinafter set forth, in terms ratifying and confirming said contract.

"Griffin, Beaudry and Lazard did nothing personally in carrying out said contract or constructing or maintaining said water works, but said company, after it had organized, took possession of said water works, and has performed all of the above-mentioned obligations of said contract, except the one providing for the return of the water works at expiration of lease, and, in such performance, has laid 320 miles of pipe, erected over 500 hydrants for protection against fire, and constructed six reservoirs, with an aggregate capacity of nearly sixty-six millions of gallons, and is now, as it has been at all times since the contract was made, furnishing the city of Los Angeles with water for the extinguishment of fires and for the public schools, hospitals and jails in said city free of charge. The aforesaid extensions of the water works were rendered necessary by the growth of said city, whose population in 1868 was between 5000 and 6000, and is now about 103,000.

"During the whole of the year 1868 the territorial limits of the city of Los Angeles were as follows: Four square leagues in a square form, the centre of which was the centre of the old pueblo plaza.

"About 1872 the limits were extended 420 yards south of

the former south boundary, and within the past three years, and prior to July, 1897, the limits were further extended so as to take in between ten and fifteen square miles of additional adjoining territory. Immediately after the extension of the said limits, the Los Angeles City Water Company began to extend its pipes over the said addition to the city as the same was settled up and improved, and ever since has been and is now furnishing water to the people in said district added to the original territory of the city, and, upon the demands of the city council, erected fire hydrants within the said additional territory and furnished water free of charge, and has in all respects continued to lay pipes, erect fire hydrants, and furnished the inhabitants with water for domestic uses in like manner as it has conducted the same business within the original limits of the city as established by the act incorporating it, and so with the more recent extensions of the city limits, to wit, those made within the last three years, the company has also extended its pipes in portions of those limits and furnished water in the same way.

"The quantity of water required to supply the domestic wants of the people of said city is one inch of water, measured under a four-inch pressure, to every one hundred inhabitants. To meet the increased demands upon it for water under said contract said company has, among other things, purchased the system known as the Beaudry system of water works, and also certain water rights in the Arroyo Seco, and conducted water from the Arroyo Seco into the city on the east side of the Los Angeles River, and has been furnishing the inhabitants of that portion of the city with water from said system, and also acquired the stock of the corporation known as the East Side Spring Water Company, the same mentioned in paragraph 10 of the complaint.

"In the growth of the city its settlement extended to localities of higher elevation than those occupied by its inhabitants at the time of said contract, and the point originally selected for the diversion of the water of the Los Angeles River for supplying the city and its inhabitants, as in said contract provided, was so located in said river that it was impracticable to

there maintain dams and diversion works that would not occasionally be swept away or rendered useless by floods, and the surface water of the river after severe storms became muddy and unfit for supplying the inhabitants with water for domestic uses, and in the year 1889 the Crystal Springs Land and Water Company made excavations in the places referred to in the bill of complaint and laid the pipes therein as alleged, and the water that has been used by the Los Angeles City Water Company for supplying the city with water, as provided in said contract, has ever since been obtained from that source, except that from time to time a further supply of water has been taken from the Los Angeles River in order to supply said inhabitants, which diversions have been at or near the place where the said underground pipes are laid, and that by these means the water can be delivered to the higher elevations, and the underground waters, as to quality and amount, are thus protected against the influences of floods.

"The Los Angeles City Water Company ever since its incorporation has taken more than ten inches of water, measured under a four-inch pressure, from the Los Angeles River, and the amount taken has increased with the increase of the population of the city and the demands of the municipality itself for water for extinguishing fires and the other public purposes referred to in the said contract, and the amount has increased until now it requires from 1000 to 1500 inches of water, measured under a four-inch pressure, for such purposes, and during the summer season the amount of water used by the Los Angeles City Water Company for the purposes aforesaid runs from 1000 to 1500 inches under a four-inch pressure, inclusive of the water obtained by the underground excavations, which latter furnish from 650 to 690 inches, measured under a four-inch pressure.

"The city of Los Angeles had always had flowing in the Los Angeles River, at the point from which said Los Angeles City Water Company has always diverted water from said river, a quantity of water sufficient to have supplied said Los Angeles City Water Company with all the water required to supply said city and its inhabitants with water for domestic purposes and

municipal uses, and has never objected, up to October 20, 1896, to said Los Angeles City Water Company taking as much water from said river as it might require for said uses, and during all of said period said city has never objected to said company's taking from the surface stream of said river at said point as much water as said company needed for said uses.

"On October the 19th, 1896, the city council of the city of Los Angeles adopted a resolution requiring the Los Angeles City Water Company to pay to the city of Los Angeles an amount of money equal to forty per cent of the gross rates received by said company from the consumers of water as rental for all water taken by said company from the Los Angeles River, and before the 21st day of October, 1896, to attorn to the city of Los Angeles, as tenant of said city, for all of the water so taken from said river, and to agree to pay said rental to said city, and in case of failure to attorn and agree to pay said rental, to refrain from diverting, taking or interfering with any of the water mentioned in said resolution (except ten inches) after the 20th day of October, 1896.

"On October the 19th, 1896, the city attorney, in writing, notified the Los Angeles City Water Company and the Crystal Springs Land and Water Company of said resolution, and demanded compliance therewith, delivering a copy of said resolution to each of said companies. Neither of them ever attorned to said city for said water or any part thereof, or ever agreed to pay any rental for the same. After the passage of said resolution and ever since said notification, up to the present time, the Los Angeles City Water Company has continually taken from the Los Angeles River, at a point above the northern boundary of said city, for the purposes of distribution and selling the same in said city, a quantity of water varying from 400 to 1000 inches, measured under a four-inch pressure.

"On the 19th day of April, 1870, the common council of the city of Los Angeles accepted, and the mayor approved, the following report:

"'To the honorable the mayor and common council of the city of Los Angeles and the Los Angeles City Water Company:

"'The undersigned commissioners, duly appointed on behalf

of your honorable bodies to adjust, fix and establish the rates and charges of the Los Angeles City Water Company, (a corporation duly incorporated under the laws of the State of California for the purpose of supplying the inhabitants of Los Angeles City with pure, fresh water), respectfully report that they have established water rates and charges for domestic purposes, taking as a guide as near as can be the charges and rates for domestic purposes charged in July, 1868; that your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows, to wit.'

"Then follow the rates agreed upon.

"The commissioners referred to in said report had been previously selected, two by the city and two by the Los Angeles City Water Company.

"In June, 1871, the city council, on a report of a committee constituted similarly to the one above mentioned, established the same rates as those established in April, 1870.

"On the 13th of August, 1874, a committee, constituted in the same manner and for the same purposes as the committee already mentioned, reported that they had established water rates and charges for domestic purposes, taking as a guide, as near as possible, the charges and rates for domestic and other reasonable objects and purposes charged in July, 1868. The report was adopted and a committee appointed in conjunction with the city attorney to draft an ordinance embodying the rates fixed in said report, and thereafter, on August the 20th, 1874, an ordinance so drawn was adopted by the council of said city, and the rates established by said ordinance were the same as those established in 1870 and 1871.

"Since and including the year 1880 the city council of the city of Los Angeles has in February of each year passed an ordinance fixing the rates to be charged by all corporations and persons within said city supplying water to the inhabitants thereof, to be in force for one year from and including July the 1st, which rates have been less than the rates charged in 1870, as contained in the ordinance hereinbefore mentioned, and the Los Angeles City Water Company has collected the rates thus fixed by the city of Los Angeles, and no more; but in

the year 1896 the council of the city of Los Angeles passed an ordinance fixing the rates to be charged for water for the year commencing July the 1st, 1896, and ending June 30, 1897, at less than they had ever been fixed before, and a suit was then brought by the complainants herein in this court against the city of Los Angeles to set aside the said ordinance; and in February of the year 1897 the city of Los Angeles passed the ordinance which is assailed in this suit, making a still further reduction in the rates.

"The action of the Los Angeles City Water Cempany in collecting the rates fixed by said several ordinances constitutes the only acquiescence (if it be an acquiescence) in the action of said council.

"If the rates established in 1870 were collected for the year beginning July the 1st, 1897, and ending June the 30th, 1898, the revenues received by the Los Angeles City Water Company from said rates would be more than fifty thousand dollars in excess of the amount which would be received under the rates named in the ordinance of February, 1897.

"In January, 1882, the Los Angeles City Water Company furnished to the council of the city of Los Angeles a statement of its transactions for the preceding year; protesting at the same time against the establishment of any rates less than those which were in force at the date of the lease hereinbefore mentioned, to wit, July the 22d, 1868.

"In January, 1883, said company again furnished said council with a statement showing the names of the consumers of water, the rates paid during the year preceding the date of the statement, and also an itemized statement of the expenditures made for supplying water during the year preceding, but expressly denying any legal right on the part of the council to demand said statement or to fix any rates less than those which were in force in July, 1868.

"Similar statements, accompanied by similar protests, were made annually thereafter up to and including the year 1889, and since that time unverified statements or reports showing its receipts and expenditures have been made by said company to the city council each year.

"Article XIV of the present constitution of California, adopted in 1879, is as follows:

"'ARTICLE XIV.

"'*Water and Water Rights.*

"'SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law: Provided, that the rates or compensation to be collected by any person, company or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation to the city and county, or city or town, where the same are collected, for the public use.

"'SEC. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and the manner prescribed by law.'

"To carry out these provisions of the constitution, the legislature of California passed an act entitled 'An act to enable

the board of supervisors, town council, board of aldermen,' etc., which was approved March 'the 7th, 1881. (Statutes of California 1881, page 54.)

"In the year 1888 the electors of the city of Los Angeles, pursuant to provisions of the constitution of said State authorizing them so to do, adopted a charter for said city, which charter was, under the provisions of said constitution, submitted to the legislature of said State for its approval, ratification and adoption, and the said charter was, on the 31st day of January, 1889, adopted by said legislature, and thereupon became and ever since has been the charter of the said city of Los Angeles, and by the said charter it is provided, in section 193 as follows:

"'The rates of compensation for use of water to be collected by any person, company or corporation in said city shall be fixed annually by ordinance and shall continue in force for one year, and no longer. Such ordinance shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Should the council fail to pass the necessary ordinance fixing the water rates within the time hereinbefore prescribed, it shall be subject to peremptory processes to compel action at the suit of any party interested.'

"The ordinance of 1897 now sought to be annulled was passed pursuant to the foregoing constitutional and statutory provisions."

A decree was entered for complainants, (appellees,) adjudging that that part of the contract entered into between the city of Los Angeles and Griffin, Beaudry and Lazard, in so far as said contract provides that the city shall not reduce the water rates below those charged on the date of said contract, is valid, and that the ordinance of February 23, 1897, reduced the water rates below those so charged, and "impaired the obligation of such contract, and said ordinance is null and void; and it is further ordered, adjudged and decreed that the said ordinance be, and the same is, hereby vacated and set aside and held for naught."

From the judgment this appeal is taken.

The assignments of error present the contentions discussed in the opinion.

Mr. S. O. Houghton and *Mr. Walter F. Haas* for appellants.

Mr. Stephen M. White and *Mr. John Garber* for appellees.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

The Circuit Court decided that the provision of the contract executed by the city and Griffin, Beandry and Lazard constituted a contract, and the ordinance of the city regulating the rates of appellees impaired it. Against this conclusion the appellant contends: (1) The contract only purports to bind the city in its corporate capacity—the city as landlord and owner, and not as a governmental agent of the State. (2) The city did not have power to bind the State; (3) the provision of the contract, restraining the city from granting any other franchise, if it created an exclusive franchise, invalidated the whole contract; (4) the act of 1870, purporting to ratify the contract of 1868, is unconstitutional and void; (5) the water company has no power under its charter to collect water rates except as prescribed by the constitution and statutes of the State; (6) by acquiescing in the regulations of rates ever since 1880 the company is estopped from claiming equitable relief, and is guilty of laches; (7) the water rates established by the ordinance are not shown to be lower than those charged in 1868, or, if lower, that the revenue of the company is reduced; (8) if the ordinance is invalid, it is void on its face, and there is, therefore, no cloud on the company's title; (9) the company violated the contract by taking water from the Los Angeles River, and, therefore, is not entitled to specific performance.

We will consider these contentions in their order.

1. The contract only purports to bind the city in its corporate capacity—the city as landlord and owner, and not as governmental agent, of the State.

The argument to support the contention, succinctly stated, is that the right to regulate rates came from the contract, not from the law. In other words, it was reserved from the contract and was a virtual granting back by the lessees of the proprietary

right, which would have otherwise passed by the lease, leaving, however, all municipal powers intact.

The provision of the contract is as follows: "Always provided, that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said parties of the second part, or their assigns, provided that they shall not so reduce such water rates, or so fix the price thereof, to be less than those now charged by the parties of the second part for water."

The municipal powers of the city provided in the act of incorporation, among others, were: "To make by-laws or ordinances, . . . to make regulations to prevent and extinguish fires, . . . to provide for supplying the city with water."

It is not denied that the city had power to regulate rates. Indeed, it is insisted that it was so constantly its duty that it could not be contracted away. It was not a power, therefore, necessary to be granted by the contract, and the distinction between the proprietary right and the municipal right, made by appellants, would have been idle to observe. To have limited the right of regulation to the city in one capacity, and left it unrestrained in the other, would have been useless, and such intention cannot be attributed to the parties. We think, therefore, the power to regulate rates was an existent power, not granted by the contract, but reserved from it, with a single limitation—the limitation that it should not be exercised to reduce rates below what was then charged. Undoubtedly there was a contractual element; it was not, however, in granting the power of regulation, but in the limitation upon it. Whether the limitation was and is valid is another consideration.

2. The city did not have the power to bind the State.

This contention as expressed is very comprehensive, and seems to deny the competency of the State to give the city the power to bind it. We do not, however, understand counsel as so contending, nor could they. *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1; see also *People* v. *Stephens*, 62 Cal. 209. We understand the argument to be that the power, if not expressly given, will not be presumed unless necessarily or fairly implied in or incident to other powers expressly given—not

simply convenient, but indispensable to them. In other words, the rule of strict construction is invoked against the grant of such power to the city.

The rule is familiar. It has often been announced by this court, and quite lately in *Citizens' Street Railway* v. *District Railway*, 171 U. S. 48.

The effect of the rule in the case at bar we are not required to determine if the act of April 2, 1870, c. 437, Stats. 1869–70, 635, ratifying the contract is valid.

It reads as follows:

"An act to ratify certain acts and ordinances of the mayor and common council of the city of Los Angeles.

"The people of the State of California, represented in senate and assembly, do enact as follows:

"SECTION 1. The following acts, contracts and ordinances of the mayor and common council of the city of Los Angeles are hereby ratified and confirmed: The contract and lease for the care and maintenance of the Los Angeles City Water Works, entered into and made between the mayor and common council of the city of Los Angeles, on the one part, and John S. Griffin, Prudent Beandry and Solomon Lazard, on the other part, dated the twentieth (20th) day of July, eighteen hundred and sixty-eight (1868;) and also the ordinance confirmatory of the same, passed July the twenty-second (22d), eighteen hundred and sixty-eight, which contract and ordinance are recorded in the office of the county recorder of Los Angeles County, in book one of miscellaneous records, pages four hundred and twenty-eight (428) to four hundred and thirty-one (431;) (here follows certain other ordinances and deeds not affecting the contract in question.)"

Appellants assert that the act violates the following provision of the constitution of the State:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

At the time of the passage of the act of 1870, the contract of 1868 had been assigned to the water company, and the facts show that it was applied for and procured on behalf of Griffin,

Beandry and Lazard, and other persons, with the intention of forming a corporation to execute its provisions, and for such purpose they and other persons organized under the laws of the State the Los Angeles City Water Company, the appellee. It is hence argued that the act of 1870 confers franchises on the company by a special act instead of by a general law, and thereby infringes the constitutional provision, and against the existence of such power in the legislature the following cases are cited: *Low* v. *City of Marysville*, 5 Cal. 214; *San Francisco* v. *Spring Valley Water Works*, 48 Cal. 493; *Orville & Virginia Railroad Co.* v. *Plumas County*, 37 Cal. 354; *Spring Valley Water Works* v. *Bryant*, 52 Cal. 132; *San Francisco* v. *Spring Valley Water Works*, 53 Cal. 608; *San Francisco* v. *Spring Valley Water Works*, 48 Cal. 493.

Of these cases, only *Low* v. *City of Marysville* and *Orville & Virginia Railroad Co.* v. *Plumas County* were decided before the passage of the act of 1870.

It was held in *Low* v. *City of Marysville* that the legislature was prohibited from conferring upon a municipal corporation powers other than governmental by a special act. Chief Justice Murray said: " . . . for as it would have been a violation of the constitution to create a corporation by special act, for any other than municipal purposes, it follows that it would be equally unconstitutional to confer special power on a corporation already created. In other words, it would be doing, by two acts, that which the legislature could only do by one; and corporations for almost every purpose might be created by special act by first incorporating the stockholders as a municipal body."

But in *California State Telegraph Co.* v. *Alta Telegraph Co.*, 22 Cal. 398, decided at July term, 1863, a contrary doctrine was announced. It was held that the legislature could grant exclusive franchises and privileges to persons or corporations; that if granted to a person they could be assigned to a corporation, and that a corporation could receive from the legislature a direct grant of special privileges and franchises. The case necessarily involved all of those propositions.

The right and privilege passed on were granted by an act of

the legislature, and consisted of the exclusive right to O. E. Allen and Clark Burnham to construct and put in operation a telegraph line from San Francisco to the city of Marysville. They assigned the right to the California State Telegraph Company. The court said: "The case presents the following questions for our adjudication: 1st, is the act of May 3, 1852, granting certain exclusive privileges to Allen and Burnham, constitutional? 2d, have the plaintiffs the power or right to purchase, hold and enjoy these exclusive privileges?"

Both propositions were answered in the affirmative. Of the second the court said:

"The next and most important question is whether the plaintiff, a corporation, had the power to purchase and hold the special privileges granted by the act to Allen & Burnham. It is not disputed that those grantees had power to sell and convey, for the act specially makes the grant to them or 'their assigns,' thus clearly making the privileges assignable. But it is urged that the clause in the constitution which prohibits the legislature from creating a private corporation by special act equally prohibits them from conferring any powers or privileges of a corporate character by special law; and that all the powers and privileges which a corporation can exercise or hold must be derived from a general law, applicable alike to all corporations.

"It is clear that the constitution prohibits the legislature from 'creating' corporations by special act, except for municipal purposes; and it is equally clear that this prohibition extends only to their 'creation.' There is nothing in the language used which either directly or impliedly prohibits the legislature from directly granting to a corporation, already in existence and created under the general laws, special privileges in the nature of a franchise, by a special act, or prohibiting a corporation from purchasing or holding such franchises, which may have been granted to others. To give the constitution any such effect we would be compelled to interpolate terms not used, and which cannot be implied without a perversion of the language employed. To give it such a construction we would have to make it read thus: 'Corporations may be formed, *and other franchises*

and special privileges granted, under general laws, but shall not be created *or granted* by special act, except for municipal purposes.' If such had been the meaning intended by the framers of the constitution, they could have easily expressed it in apt words. The language used by them is clear, and they well knew that it included but one of a numerous class of franchises, the subjects of legislative grant, and that a regulation of one could not by any reasonable implication be extended to others not mentioned."

And the learned justice who delivered the opinion of the court concluded the discussion by saying: "I hold, then, that the plaintiffs, as a corporation, were capable of receiving a grant of these special privileges directly from the legislature, and of purchasing them from the grantees."

There was an implied recognition of the same doctrine in *Spring Valley Water Works* v. *San Francisco*, 22 Cal. 434.

But it is urged by appellants that *Orville & Virginia Railroad Co.* v. *Plumas County*, (decided in April, 1868,) held "that the legislature could not authorize the county to grant special privileges to a private corporation, and this was confirmed in *Waterloo Turnpike Co.* v. *Cole*, 51 Cal. 384, (decided in 1876)." The latter case we may disregard, as it was decided subsequently to the act of 1870. The former case did not decide as contended, nor was the point involved in it. The action was mandamus to compel the county to subscribe to the capital stock of the railroad company under an act of the legislature directing the supervisors of the county to meet at a designated day and take and subscribe to the capital stock of the railroad company.

The defence was not want of power in the legislature to direct the subscription — not want of power in the company to receive it because it was a corporation, but want of power to receive because it was not a corporation. Against this it was urged that the act of the legislature recognized the company as a corporation. To the contention the court replied: "But it is claimed that the existence of the corporation is recognized by the act requiring the county to subscribe to the stock of the company. Admitting such to be the case, that will not overcome the difficulty, for a corporation of this character cannot

be created by legislative recognition; the constitution (art. IV, sec. 31,) prohibiting the creation of corporations, except for municipal purposes, otherwise than by general laws."

It follows, therefore, that at the time of the contract of 1868 and of the passage of the ratifying act of 1870 it was established by the decision of the highest court of the State that the constitution of the State permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons or grants of them directly from the legislature. This law was part of the contract of 1868, as confirmed by the act of 1870, and could not be affected by subsequent decisions. *Rowan et al.* v. *Runnels*, 5 How. 134; *Ohio Life Ins. & Trust Co.* v. *Debolt*, 16 How. 416; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *Chicago* v. *Sheldon*, 9 Wall. 50; *Olcott* v. *The Supervisors*, 16 Wall. 678; *McCullough* v. *Virginia*, 172 U. S. 102. Nor by the new constitution of 1879. *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Fisk* v. *Jefferson Police Jury*, 116 U. S. 131; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S. 64.

The subsequent decisions of the Supreme Court of the State have not been uniform. *San Francisco* v. *Spring Valley Water Works* unqualifiedly overruled *California State Telegraph Co.* v. *Alta Telegraph Co.*, but *People* v. *Stanford*, 77 Cal. 360, restored its doctrine to the extent, at least, of holding that the constitutional provision that "corporations may be formed by general laws, but shall not be created by special act," only prohibits the creation of corporations and conferring powers upon them by legislative enactment, and does not prohibit "the assignment of a franchise to a legally organized corporation by persons having the lawful right to exercise and transfer them." See also *San Luis Water Co.* v. *Estrada*, 117 Cal. 168.

There are expressions in the latter case which, it is urged, notwithstanding the modification by it and by *People* v. *Stanford* of the doctrine of *San Francisco* v. *Spring Valley Water Works*, make that doctrine applicable to the case at bar. The San Luis Water Company was a corporation, and was formed for the purpose of furnishing the town of San Luis Obispo and the inhabitants thereof with pure fresh water.

By an act of the legislature, entitled "An act to provide for the introduction of good and pure water into the town of San Luis Obispo," approved March 28, 1872, a franchise was granted for that purpose to M. A. Benrimo, C. W. Dana and W. W. Hays. The San Luis Water Company claimed to be the assignee of the franchise. The assignment was attacked on the ground that it was invalid under the constitution of the State. The court said: "The precise point made is, that the power to supply a city with water cannot be conferred directly or indirectly upon a private corporation by special act."

And further: "The grant to Benrimo and his associates was also to their assigns. There can be no doubt but that they might, by the terms of the grant, sell or assign the franchise. It seems to me too plain to require argument that the purchase by the plaintiff was strictly and directly within its powers and contributed necessarily and directly to its objects and purposes." But the learned commissioner who delivered the opinion also said: "If any connection could be traced between the plaintiff and the passage of the special act of 1872, or it appeared that the act was obtained for the purpose of evading the constitutional inhibition, I could see how the case of *San Francisco* v. *Spring Valley Water Works*, *supra*, might apply. But, in view of the facts in this case, I cannot regard the article of the constitution mentioned or the case last cited as having any application here." But this is not a decision that the case would apply. And if it is a concession of strength in the argument it is not a concession of conclusive strength.

We are not concerned, however, to reconcile the cases decided since 1870, and we have only mentioned them to present fully the contention of appellants. The cases prior to that time, as we have seen, made the obligation of the contract of 1868, and determined the power of the legislature to ratify it. And there seems to have been no question of this power. Besides legislative recognition, besides recognition by many acts of the city, the contract has received judicial recognition. Taxation upon the property acquired to execute it has been sustained. *Los Angeles* v. *Los Angeles Water Works Co.*, 49 Cal. 638. It was interpreted, and under its provisions the company denied com-

pensation for water used in sprinkling the streets of the city. *Los Angeles Water Co.* v. *Los Angeles*, 55 Cal. 176. An ordinance was declared void imposing a license upon the company for doing business in the city. *Los Angeles* v. *Los Angeles Water Co.*, 61 Cal. 65. Its right to take more than ten inches of water from the river was sustained in *Los Angeles* v. *Los Angeles Water Co.*, 124 Cal. 368.

The case in 61 Cal. 65, was heard in department and in banc, and the contract received careful consideration. The judgment of the trial court was for the water company, and department 2 of the Supreme Court, affirming it, said:

"The court was correct in its judgment. The plaintiff had already reserved a sum to be paid by defendant for the privilege of vending water for domestic purposes, and it could not change its contract in the manner proposed. The privileges granted by the lease and the ordinance of 1868 were already vested in the defendant as strongly as they could be by a license under the ordinance of 1879. A license is a grant of permission or authority. The defendant already had permission and authority granted by ordinance and ratified by the legislature. The city cannot, during the term of the lease, of its own motion, increase the amount to be paid for the privileges granted.

"It is hardly necessary to say that the point made by the appellant, that neither the city nor the legislature can grant or alienate any of the rights of sovereignty, has no application to this case."

The court in banc, through its Chief Justice, approved this language, and after quoting cases, said:

"The authorities of the city of Los Angeles by a contract (the validity of which has not been challenged by either party) and for certain valuable considerations therein expressed, granted to the defendant's assignors the privilege of supplying the city of Los Angeles and the inhabitants thereof with fresh water for domestic purposes, with the right to receive the rents and profits thereof to their own use;" and after citing cases to show that the exaction of the license would impair the obligation of the contract, concluded as follows:

"The principles enunciated in the foregoing cases are emi-

nently sound and just, and are directly applicable to the case we are now considering. The city of Los Angeles, by its solemn contract, and for various considerations therein stated, gave to the party under whom defendant claims the privilege of introducing, distributing and selling water to the inhabitants of that city on certain terms and conditions, which defendant has complied with, and it was not within the power of the city authorities, by ordinance or otherwise, afterward to impose additional burdens as a condition to the exercise of the rights and privileges granted."

3. The provision of the contract, restraining the city from granting any other franchise, if it created an exclusive franchise, invalidated the whole contract. 4. The act of 1870, purporting to ratify the contract of 1868, is unconstitutional and void. 5. The water company has no power under its charter to collect water rates except as prescribed by the constitution and statutes of the State.

These contentions are dependent upon the same reasoning as the preceding one, and do not require a separate discussion.

6. By acquiescing in the regulations of rates ever since 1880 the company is estopped from claiming equitable relief and is guilty of laches.

There was no such acquiescence as estopped the water company from contesting the ordinance of the city. The facts are that in 1880 the city passed an ordinance to be in effect one year, establishing water rates, and passed one every year thereafter, including 1897, when the one in controversy was passed. The rates established by the ordinances were less than those adopted in 1870, and the latter are claimed to have been not higher than the rates charged in 1868. The company collected the rates established by the ordinances, except those established in 1896 and 1897. A suit was brought by the company to set aside the ordinance of 1896, and that of 1897 is assailed in the case at bar. These ordinances fixed the rates at less than they had been fixed before. The company has also every year since 1882 filed a statement with the city council, showing the names of the consumers of water, the rates paid and the expenditures made for supplying water for the preceding year. The company

always protested against the right of the city to demand statements, and claimed to make them solely for its information. The company also in 1882 protested against the power of the city to fix rates on any other basis that that of the contract of 1868. The city therefore cannot claim to have been deceived by the action of the company in collecting the rates established prior to 1896. They were less, it is stipulated, than those of 1870, but how much less we are not informed. It is true we are not informed how much less those fixed in 1896 and 1897 are than those of the prior years. They are less, "less than they had ever been fixed before," is the stipulation; and they will, according to the stipulation, produce more then fifty thousand dollars less revenue than those of 1870.

Acquiescence in a regulation which, all things considered, may not have been injurious, does not preclude a contest of that which is injurious. It must be remembered that the contract did not forbid all regulation, but only regulation beyond a certain limit. There was no concession of a power to go beyond that limit, but constant protest against it; and when its exercise did go beyond that limit, producing injury not balanced by other considerations, the right to restrain it would naturally be, and we think, could legally be, exerted. As we have said, there was no concealment, no misleading, no injury, no change of condition, no circumstance which could invoke the doctrine of estoppel or of laches. Appellants, however, assert there was, and claim that the acquiescence of the water company was induced by the fear that the city would prevent the unlimited use of the river water—a use beyond the ten inches claimed to be allowed by the contract, and a use against other and proprietary rights of the city. Of the latter the record does not enable us to form a judgment. Of the former the Supreme Court of the State (124 Cal. *supra*) has decided against the contention of the city. We approve the decision and hereafter quote its language. The appellants' inference, therefore, is without the support of anything in the record.

7. The water rates established by the ordinance are not shown to be lower than those charged in 1868, or, if lower, that the revenue of the company is reduced.

To sustain this contention it is claimed by appellants that there is no testimony in the record to show that the rates established in 1897 were lower than those charged in 1868. Appellants say:

"The only thing which complainants rely on to establish this fact is the recital in the report of a committee of the council appointed in 1870 for the purpose of agreeing with the water company upon a schedule of water rates to be charged, in which it stated (by the joint committee) 'that they have established water rates and charges for domestic purposes, taking as a guide, as near as can be, the charges and rates for domestic purposes charged in July, 1868. That your committee have also fixed the rates and charges for other reasonable objects and purposes, and report as follows.'"

It is urged this is not a statement that the rates fixed in 1870 were equal to those of 1868; indeed, that they may have been higher. And it is also urged there is a distinction made between rates for domestic purposes and rates for "other reasonable objects and purposes," which may mean not domestic purposes, and as to these it does not appear upon what they were based.

We are not disposed to dwell long on these claims. It is incredible that the city should have demanded statements from the company yearly; have passed ordinances yearly, and provoked and endured an expensive litigation to establish rates higher than or the same as those which already existed. If statements and ordinances were necessary in fulfilment of the duty of the city under the constitution of the State, neither controversy or litigation was necessary, nor would either have ensued.

It is urged under this head that it is not shown that the income of the water company is less under the rates fixed by the city than under those of 1868. The showing would be irrelevant. The contract concerns rates, not income, and the power of the city over them under the contract.

8. If the ordinance is invalid, it is void on its face, and there is, therefore, no cloud on the company's title.

The contention is that "if the contract of 1868 is valid, and the ordinance of 1897 reduces the income of the company below

that which it should receive, the ordinance is void on its face as being in conflict with the Federal Constitution, and is no cloud on complainants' title."

It is hence deduced that the water company has adequate legal remedies, and cannot resort to an equitable one.

We concur with the learned trial judge that the ordinance is not void on its face. As said by him—

"In the case at bar, however, the ordinance upon its face is valid, 88 Fed. Rep. 747, 748, and its invalidity appears only when considered in connection with the contract of July the 22d, 1868, and evidence showing what the water rates were at that date. While the court takes judicial notice of the ratifying act of April 2, 1870, still, since the provisions of the contract of July the 22d, 1868, are not embodied in said act, I am not sure that said provisions are matters of judicial knowledge, although such seems to be the ruling of the court, (one of the justices dissenting,) in *Brady* v. *Page*, 59 Cal. 52. Conceding, however, that the court will take judicial notice of all the provisions of said contract, still the one in question simply provides that water rates shall not be reduced below the rates then charged, without indicating what those rates were, and therefore the invalidity of the ordinance appears, not upon its face, but only in connection with extraneous evidence of what the rates were in July, 1868, and for this reason complainants have adduced that evidence in the present case."

And further —

"The defendants must either submit to the terms of the ordinance, or incur unusually onerous expenditures. It is reasonably certain that if, with the ordinance standing, they were to undertake the collection of rates in excess of those prescribed in the ordinance, they would be resisted at every point by the consumers of water, and thus be driven to innumerable actions at law. Besides, should they, in any instance, succeed in collecting, without an action, a higher rate than the ordinance prescribes, it is equally certain that they would thereby bring upon themselves protracted and heavy litigation, having for its object forfeiture of their entire system of works. Surely these injuries are irreparable, and actions at law, so far from being adequate

to the exigencies of the situation, are, as complainants, in their brief, forcibly put it, mere mockeries of a remedy."

9. The company violated the contract by taking water from the Los Angeles River, and, therefore, is not entitled to specific performance.

In reply to this contention we may adopt the language of the Supreme Court of the State of California, used on behalf of the court by Mr. Justice McFarland, in *Los Angeles* v. *Los Angeles City Water Company*, 124 Cal. 377.

The contract of 1868 and the right of the water company to take water from the river was considered and decided. The learned justice said:

"Before considering the main questions in the case, it is proper here to notice a preliminary point made by the city, and somewhat insisted on, to wit: That the only quantity of the water of the Los Angeles River to which the water company is entitled under the contract is ten inches under a four-inch pressure. This contention cannot be maintained. The words of the contract on this subject are simply that the company shall not take from the river 'more than ten inches of water without the previous consent' of the city; there is nothing in the contract about 'four-inch pressure,' nor is there any intimation as to what the parties meant by 'ten inches' of water. But, looking at the context and the subject matter of the contract, it is quite evident that the parties did not mean only ten inches under a four-inch pressure. If that had been the meaning, there would have been no sense in the other important covenants. At the time of the contract it would have taken many times ten inches under a four-inch pressure to furnish water for domestic purposes to even the few thousand people who were then inhabitants of the city; and much more than that amount was necessary to supply free water under the contract; and a solemn covenant to supply a growing city with sufficient water for domestic and municipal purposes for thirty years from a flow of ten inches under a four-inch pressure would have been absurd. The company, immediately after the date of the contract, commenced to use an amount of water greatly in excess of ten inches under a four-inch pressure; soon after the execu-

tion of the contract the company was using three hundred inches under a four-inch pressure, and from that to the present time they have been using, with the knowledge and consent of the city, from three hundred to seven hundred inches so measured. Therefore, whatever (if anything) was meant by the simple words 'ten inches,' the contract was immediately, and has been continuously, construed by the action of the parties as meaning more than ten inches measured under a four-inch pressure. There is no pretence that the city ever objected to the use of this water by the water company until 1896, when an ordinance was passed by the city government undertaking to withdraw the city's consent to the taking of more than ten inches from the river. It is difficult to imagine how this ordinance was passed seriously; for if the water company had been prevented from taking from the river at that time more than ten inches of water under a four-inch pressure, there certainly would have been a water famine in the city, for the city had no works of its own and no means whatever for supplying water for either domestic or municipal purposes. But the city, having allowed the water company, for nearly thirty years, to divert the quantity of water above mentioned, and to expend vast sums of money upon the faith of a continuance of the right to take said water, could not withdraw its consent within the period of the contract."

The learned justice then quoted and approved the following remarks of the Circuit Court in the case at bar:

"'If it be conceded, as claimed by defendants, (which, however, I do not decide,) that the provision of the contract, limiting the quantity of the water to be taken from the river without previous consent of the city, is sufficiently certain for enforcement, or, more specially, that said quantity is ten inches measured under a four-inch pressure, still the consent of the city to the taking of a larger quantity, once given, cannot be withdrawn during the life of the contract, for the reason that large expenditures have been made by complainants in reliance upon such consent.' The court cites as authorities to the point: *Rhodes* v. *Otis*, 33 Ala. 600; 73 Am. Dec. 439; *Woodbury* v. *Parshley*, 7 N. H. 237; 26 Am. Dec. 739; *Lacy* v. *Arnett*, 33 Pa. St.

169; *Russell* v. *Hubbard*, 59 Ill. 339; *Beall* v. *Marietta &c. Mill Co.*, 45 Ga. 33; *Veghte* v. *Raritan Water Power Co.*, 19 N. J. Eq. 153; *Wilmington &c. R. R. Co.* v. *Battle*, 66 N. C. 546; *Flickinger* v. *Shaw*, 87 Cal. 126; 22 Am. St. Rep. 234; *Grimshaw* v. *Belcher*, 88 Cal. 217; 22 Am. St. Rep. 298; *Smith* v. *Green*, 109 Cal. 228, all of which sustain the point."

Decree affirmed.